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**No. XXVII.**

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**ART. I.—THE RIGHTS, DISABILITIES, AND  
USAGES OF THE ANCIENT ENGLISH  
PEASANTRY.**

**PART IV.—*General Services.***

**T**HE want of intelligent workmen, without the concurrence of other causes, might have destroyed the old English predial polity, if that system had not failed through its own nature ; having been essentially rude and awkward and uncommercial. Under the Plantagenets, service could in general be reduced to money at the discretion of the lord or the option of the tenant.\* The service often cost the tenant more than it was worth—he found it cheaper to pay than to work : on the other hand, money must have been at all times welcome to the lord, and he did not at all times require labour. In the course of time agricultural service went out of use altogether, and money was regularly tendered and accepted instead of it : so that the

\* Eorum consuetudines redacte sunt in redd' assis' ad voluntatem domini. (2 Hundred Rolls, 668.) Ista debent facere tenentes vel dare pecuniam si domino placuerit. (Add. 6159, f. 37, 38.)

improved rent, as it has been called, now paid by a farmer, appears to be a compound—historically considered—of the ancient mail or gable, and of a great variety of petty charges, which were originally compensations for tributes of corn, malt, poultry, bacon, and eggs—or fines for the non-performance of acts of tillage, carriage, portage and the like. The elements of rent were recognised in Scotland longer than in England, because petty charges subsisted in Scotland for some time after they had been abandoned in England. At the beginning of the eighteenth century, David Deans—the tough true-blue Presbyterian farmer—still paid “mail duties, kain, arriage, carriage, dry multure, lock, gowpen, and knaveship, and all the various exactions now commuted for money, and summed up in the emphatic word RENT.”\*

In our opening paper we divided agricultural tenants into two classes—observing that superior tenants only worked occasionally, and only performed the more important acts of husbandry; while pure villeins worked constantly for their lord, and were liable to all kinds of labour. But servile works were peculiarities attached by long usage to the tenement, and did not always follow the person of the tenant. Any freeman might come into the occupation of a tenement in pure villenage, and might perform the services due from such a tenement without degradation, because the services were done on account of the nature of the tenement, not on account of the personal condition of the tenant.† When we read that the chaplains of Palgrave hold one acre and render fifteen pence and one seam and two bushels of oats . . . also three ploughings and three weedings and three harvestings with meat unum averagium ad terga per xii leucas circiter villam de Redgrave . . . et implebunt carectam fimo per dimidiam diem‡ . . . we are not to believe that the reverend gentlemen actually filled dung-carts with their own hands, or that

\* Heart of Mid-Lothian, ch. viii.

† Co. Litt., 116 b.

‡ Add. 14850, f. 69.

they carried burdens on their backs to any place within twelve leagues of Redgrave: these duties might be commuted, or could be done for them. The chaplains held another tenement in the manor of Redgrave—seventeen acres—at a quit-rent of sixpence per annum.

Villenage and operative tenancy were almost extinct at the time of the Reformation. The few villeins, or operative tenants, then remaining, were in the occupation of small plots of land, and were in fact agricultural labourers working for wages, rather than tenants paying their rent in labour. They were scarcely to be found excepting upon church-lands, or upon lands which had lately belonged to the Church. Sir Thomas Smith has made this fact a reproach to the Church, saying—that holy fathers, monks and friars, although constant in urging laymen to manumit their bondmen, were not so ready to do the like by their own bondmen.\* But if bondage became extinct in lay fees sooner than in church property, it was because lay lords were always in want of money, and were for ever unsettling, mortgaging, alienating, and forfeiting their estates. The feudal bond between a lay lord and his tenants in time grew slack; indeed, after the expedient of the conveyance of land to secret uses became general, the tenants of a lay lord could scarcely be sure that they knew the very name of their landlord; the person receiving their rents might be no more than a mere trustee. Villenage, then, endured longer in church lands than in lay fees because churchmen allowed their tenants to remain under ancient customs, not because churchmen were the worst landlords: on the contrary, English tenants were ready to say with German tenants—"It is good to live under the crosier!" †

An operative tenant of five acres usually worked once a week for the lord. We learn from Domesday that bordars were tenants of five acres, and that the bordars under the Castle of Ewias

\* *The Commonwealth of England*, 261, 262.

† *Unter dem Krumstabe ist gut wohnen.* (1 Anton, 81.)

worked once a week:\* the Saxon cottar held at least five acres, and was accustomed to work for the lord every Monday.† This custom prevailed in later times. If a tenant worked for the lord once a week the working day was commonly Monday. Hence we meet with a class called Mondaymen—lundmarii—whose tenements were called Monday-crofts, Monday-lands, or Monedayles. The Mondaymen at East Brent, in Somerset, had the following customs in the year 1517—each of them, by ancient usage, should annually, in forty days selected by the lord's steward, do forty works of summer and winter husbandry, called Monday-works, working and labouring well each day for six whole hours; each of them receiving, while at work, a halfpenny, the sum of which is twenty pence per annum: and each of them who should do eight autumnal works, working well six hours a day as before said, should receive one penny a day. At the same time there were Mondaymen at Limpesham in the same county; and they are noticed in earlier rentals at Castle Combe in Wiltshire, at Leighton in Huntingdonshire, in East Kent, and at Bocking and Hadleigh in the eastern counties. ‡

At Bury St. Edmunds, in Brakelond's time, there were humble servitors called Lancetts, bound by their tenure to clean the chambers of the monastery. A tenant of the abbey at Cokefield, whose tenure is not called lancettage, was obliged to thatch, to wattle and daub, to do carpenter's

\* xii bordarii operantes una die ebdomad'. (Great Domesday, f. 186.) tenet unum bordellum et operatur die Lunæ in ebdomada. (Tindal's Evesham.)

† he sceal ælce Mon-dæge ofer geares fyrst his laforde vyrcan. (Laws of Landright.)

‡ Item dominus habet Monendayesmen scilicet Rob' Kouper qui tenet unum Monendayescroft et redd' iiii<sup>d</sup> et operabitur omni die Lune per annum exceptis tribus diebus Natal' Pasch' et Pentecost'. (2 Hundred Rolls, 617.)

Item sunt ibi viii monedayles et debent a festo S. Michaelis usque ad pentecostem qualibet septimana quelibet terra unum opus scilicet die lune nisi aliqua festivitas eodem die evenerit. . . . Item vi monedaylond' debent arrare. . . . (Add. 6159, f. 183, also 53, 189, and 6160, f. 67, b.)

Opera lundmariorum in generali expressa. Opera customariorum tenencium Domini ibidem, vocata Moundy-warkes, facta per diversos tenentes, vocatos Mondeymen, videlicet quod quilibet eorum, ex antiqua consuetudine . . . (Hearne's John of Glaston., 323, 331, App.)

work, to collect compost, to clean houses, etc.—but was not required to clear out the lord's *latrines*.\* According to Spelman, lancetts occur very frequently in an old custumal of Lewes Priory. . . . in the soke of Hecham are twenty-four lancetts; the custom of them is that each ought to labour from Michaelmas until autumn in every week for one day with the prong, or spade, or flail, at the lord's will; they are to have a meal at three in the afternoon, and a loaf in the evening: they are to pay sixpence if not required to work in this manner: in addition to this labour and these days, each of them shall work in autumn for three pence every week on Mondays, Wednesdays, and Fridays, with a ration from the lord at three o'clock. . . .† This is not unlike the tenure of the Monday-men just now noticed. Blomfield observes lancetts at Hendringham in Norfolk, and thinks that a lancettage consisted of eight acres.‡

An operative tenant of ten or twelve acres worked two days in the week, with some additional tasks in harvest time; and a tenant of fifteen acres or more, worked three days; the tenant of an entire tenement worked three days.§ This arrangement was not peculiar to England, for it appears in Charlemagne's Ordinances, and it was generally understood in Russia fifty or sixty years ago that a peasant was bound to work for the lord three days in the week, and that the three days remaining were his own.||

\* Jocelin de Brakelond, 74, 150. Et debet cooperare domus vel Watlare, vel daubare vel carpentare vel fimos unare vel domus mundare vel curtilagia fodere vel muros facere vel alia pertinencia in curia a mane usque ad ix pro i opere preter quod non debet mundare latrinas domini abbatis. (Harl. 3977, f. 98, b.)

† Spelman, Lanceta.

‡ 9 Blomfield, 227.

§ Boldon Book passim. unusquisque tenet xv acras de Lancet' et facit iii operationes in ebdomada . . . unusquisque tenet x acras et faciet ii operationes in ebdomada . . . unusquisque tenet v acras et faciet unam operationem in ebdomada. (Harl 3977, f. 53.)

|| unusquisque annis singulis friskingam i pullos v ova x nutrit purcellos dominicos iv arat dimidiam araturam operatur in ebdomada iii dies. (Kar. Magni Cap. 3 Pertz. 177.)

ii mancipia, quæ sibimet ipsis iii dies in ebdomata proficiant, iii dies sancto Nazario serviunt. (1 Anton, 339, 338.)



Small services, such as threshing, thatching, delving, building, and enclosing, were called minute operations, manual operations, handenes or handaynes. A tenant bound to do three handaynes in a week, had to thresh a quarter of wheat; another had to thresh three daynes, which if of wheat would consist of six bushels, if of beans or barley of three bushels, if of oats of eighteen bushels.\*

A tenant worked off one handene by making two perches, or eleven yards, of dike. A tenant at Darent, near Rochester, in the thirteenth century, did two perches of enclosure around the court, and seven perches of Racheie<sup>xx</sup> around the lord's corn. The service of enclosing the hall-garth or court-yard was called "burghard," or "burgyard." The tenants are still obliged to keep up a stone wall round the site of the manor house at Brotherton, in Norfolk; the mansion itself disappeared long ago. The fencing of a park was in some places distributed among a number of townships, each undertaking to maintain so many rods of paling; this was the custom at Pilton, in Somerset, where there was a deer-park belonging to the Abbot of Glastonbury.† The churchyard at Bradley, in Staffordshire, is said to be still enclosed by the parishioners associated in this manner, that is, each person is bound to finish a certain portion of paling.

The tenants also made or maintained the lord's sheep-fold. Each hyde at Thorpe in Essex had to make four cleys of rods for the fold out of the lord's wood. The twenty-five yokes of land at Southfleet had to make twenty-five cleys, the lord

\* *facere qualibet ebdomada iii handenas scilicet triturare, fossare, claudere, domos cooperire, et muros erigere.* (Add. 17450, f. 70, b.) Notandum est quod die quando summagiat vel arat vel bladum metet quietus erit de handaynis. (f. 34, b.) pro iii handaynes debet triturare i summam frumenti (f. 23, b.) debet triturare tres daynes que si fuerunt de frumento continent vi buss'. . . . (f. 19.)

† sciendum quod quando fossat pro handena debet fossare ii percat'. (ff. 68, 68 b.) Et claudent circa curiam duas parcatas. Et claudent circa bladum domini vii parcatas de Racheie. (Custumale Roffense.) Item debent claudere xlvii virg' de burgyard vel dare iii<sup>s</sup> xi<sup>d</sup> ob' videlicet de quolibet jugo ii<sup>4</sup>. . . De burghard quam tenentes debent facere . . . (Add. 6159, ff. 159, 165, b.)

Blount, 324. Add. 17450, f. 153, b.

finding the materials; the tenants were to carry the cleys entire to the sheepfold, and to keep them up for a year, coming at Hocktide to see whether they were in good order. In a survey of Beauchamp—not printed in the Domesday of St. Paul's, but cited by Archdeacon Hale—each cley is said to be made of nine stacks; one foot should be between the stakes; there should be one large stake and a writh or waver. In some places the tenants had to shift the fold at certain times—once a year, or twice a year, as at Martinmas and Hockday, and were not required to make the cleys.\*

At times the tenants had to spread compost in the lord's field. To spread one row or rank of compost, or three rows of the length of a furlong, was a day's duty. They also collected stubble out of the corn-fields, and reeds out of the marsh; reeds and straw were strewn in apartments, and used for thatch or fuel. In many places they were required to gather nuts in the woods for the lord: the nuts were for making oil; a quarter of nuts answered to a gallon of oil.†

\* *quelibet hida debet facere de bosco domini iiii cleras ad faldam de virgis. (Dom. S. P. 43.) De xxv jugis facient xxv cleies, et dominus illis materiem inveniet, et portabunt integras ad ovile, et illas per annum servabunt ne decident, et venient ad terminum de Hokedei ad videndum utrum integre sint an non; et si non venient erunt in misericordia domini. (Cust. Roff.) quilibet cotarius faciet iiii crates et eas cooperiet. (Add. 6159, f. 32.) debent invenire ad predictum ovile xl clays annuatim. (f. 50.)*

Cladus—a hurdle for sheep is still in some counties called a cley. . . . (Kennet's Glossary.)

Cleys are mentioned by Fitzherbert. (F. N. B. 208.) *debet remove re iiii cleyas de caula domini semel per annum (Add. 17450, f. 50.) debet portare bis in anno faldam domini et valet ob' scilicet ad festum sancti Martini i cleyam et ad Hokeday i cleyam. (f. 183.)*

† *Et debet spargere tres rogos fimorum longitudinis unius quarentene pro una opera.—Customs of Hatfield. (2 Clutterbuck's Herts, App.) si debet dispergere compostum in campo disperget rengum de composto. (Add. 17450, f. 32.) debent falcare xii carectas de glui et ligare et ducere ad Curiam. (Add. 6159, f. 61.) colliget per unum diem glui in campis domini. (f. 166 b.) colligere ros in curlème. (Add. 17450, f. 22.) metet arundinem cum necesse fuerit. (f. 122.) Falcabunt juncum et portabunt in curiam. (Cust. Roff.)*

Headington] uno die colligent nuces nomine domini in bosco qui vocatur Stowode. (Kennet 320. 2 H. R. 710.) nuces colligere per tres dies festos de singulis domibus singulos homines. (Dom. S. P. 38.) un quarter de noyz deit respoundre de iiii galons de oille. (Hosebonderie.)

Nutting was rather a pastime, or holiday-task, than a service. The nutting expeditions at Wickham, in Essex, were to be made on three feast-days, which are not named, but Holy-Rood day, the fourteenth of September, may have been one of them. The editors of the "Popular Antiquities" cite the old drama of "Grim, the Collier of Croydon"—

"This day, they say, is called Holy-Rood Day,  
And all the youth are now a nutting gone."

To make malt for the lord was usually the chief service of the poorer tenants in the immediate neighbourhood of a monastery, as at Darent and other places near Rochester, and at Battle; tenants at a distance, instead of making malt, in some places paid a tax called malt silver. The cottagers carried their lord's malt to the flour mill to be crushed, for they were not allowed to keep hand mills or morters, which might be used in grinding corn. The malt might be dried at home, for kilns were common in old houses, but in some manors the lord had a public kiln, which the tenants were bound to make use of.\*

A tenant under the ban of a soke-mill who withheld the service due to it, or followed another mill, had to pay a fine and forfeited his horse and his sack with the corn or flour in it. Almost all mills in France and Scotland were banal, but in England soke-mills were not very common. At Wryngton, in Somerset, the customary tenants were held to grind their grain at the lord's customary mill, or to pay an annual fine: a yardlander, or tenant of about thirty acres, paid two shillings and eightpence, a tenant of three parts of a yardland paid two shillings, a tenant of half a yardland paid sixteenpence, a tenant of a quarter of a yardland paid eightpence, a cottager of ancient tenure paid fourpence. Tenants were usually required to repair the soke-mill and

\* Debet triturare contra Natale Domini in orreo Domini sui ii quart' orde et faciet inde brasium ad domum suam et siccabit et postea cariabit ad molend' ad moland' et de molend' ad pistrinum domini sui. (2 Hundred Rolls, 539.) dabit iii gallinas quæ vocantur Malthennes. (541.)

its dam, and to fetch new mill-stones whenever they were needed.\*

The most irksome tasks were the transport services, called in Scotland the duties of arriage and carriage. Old Skene tells us that . . . Arage, vtherwaies average, is from Aver, which signifies ane beast . . . and swa consequently average signifies service the tennant aucht to his maister by horse or carriage of horse . . . We read likewise of *fotaver*, *averagium ad pedes*—of a man bound *averare super dorsum suum*—and of tenants called *pouchers*—*pokaveragii*, because they were required to carry goods in a poke, pouch, or bag.†

A seam—*summa*—the load of a sumpter-horse—*summarius*—was usually eight bushels—the weight of a sack of wool, or of a quarter of corn; but in some places an average or horse-load was no more than six bushels. The custom of the gavelmen at Southfleet was as follows—if the lord wished to send corn to London they came with their avers and sacks to the granary of Southfleet, and each of them took three-quarters of a seam, or six bushels, and carried it to Gravesend, Northfleet, or Greenwich, and put it on board ship in their own sacks; if the sack of any one of them was lost he was not

\* Si quis autem de prædicta soca renuerit venire ad prædictum molendinum, et repertus fuerit veniens ab alio molendino non solito, saccus et bladus et equus et forisfactum erunt canonicorum. (6 Monasticon, 204; also 399.) tenentes custumarii tenentur molere grana sua ad molendinum Domini consuetum vocari Benemyllle modo in tenura Edmundi Leuer-egge Ferdellarii, aut solvere redditum annualem in denariis, ut sequitur, viz. quilibet virgatus ii<sup>s</sup> viii<sup>d</sup>. Triferdell' ii<sup>s</sup> dimid' virgat' xvi<sup>d</sup>. Ferdell' viii<sup>d</sup>. et cotarius antiqui astri iii<sup>d</sup>. (Hearne's John of Glaston., 353.)

The hardships of living under the ban of a mill in Scotland are described in the Monastery, chap. xiii.

† Qui non avrant faciunt fotaver. (Dom. S. P. 3, 6.) debet unum averagium ad pedes. (83.) debet averare super dorsum suum quandoque placuerit domino. (Harl. 3977, f. 100.) Pokaveragii. (f. 37. b.) qui tenent pokeaver. (f. 38.)

On the first spring-tide after the 24th of June, the poor who possess neither cart nor horse have the exclusive right to cut *vraic* [=wrack, seaweed] on consideration that it is conveyed on their backs to the beach . . . Thus cut and conveyed it is called *vraic à la poche*, and distinguished from *vraic à cheval*. (Channel Islands' Agri. Report, 276.)

bound to do arriage until the lord had replaced it.\* A wain-load was apparently nine seams. The goods carried were chiefly provisions—grain, pulse, malt, honey, bacon, suet, salt, and wood. A castle or monastery was *farmed*—that is supplied with food—by the nearest manors belonging to the lord. The farming was done according to a regular cycle, each manor sending supplies in its turn for so many days or weeks. We have a list of thirty-five villages which took turns to farm Ely Minster—some for three or four days, some for a week, some for a fortnight. In the Rochester Custumal we have the order in which the neighbouring manors are to do the farms for Rochester; the first month of Southfleet beginning on Michaelmas-day, the month of Wouldham on the eve of St. Simon and St. Jude, the first fortnight of Stoke on the eve of St. Katherine, and so on through the thirteen lunar months—the catalogue ending with the third month of Frindsbury, which began on the eve of St. Giles the Abbot, and ended on the eve of Michaelmas.

Everything contributed in this manner did not travel in waggons, or packs and panniers; oxen and swine were driven to the head of the barony to be slaughtered, especially at Martinmas; if the drovers came from any distance they received drove-meat.† Arriage and carriage were not very

\* Sunt viii<sup>22</sup> Averag' que continent cccxxxvii summas ordeï videlicet vi buss' pro averag'. (Add. 6159, f. 25.) Debent et hanc consuetudinem gavelmanni de Suhtfliete. Si dominus voluerit mittere Londonias venient cum averis suis et saccis ad granarium de Suhtfliete, et accipiet unusquisque tres partes summe. . . . (Cust. Roff.)

† Inprimis Scelford duarum solvit firmam ebdomadaram, Stapelford unius, Litleberi duarum. . . . (Hist. Elien. II. 84.) debet cariare lanam aut caseum domini ubi necesse fuerit in eodem comitatu vel apud Winterborn vel apud Merlebergh. (Add. 17450, f. 25.) debent droviare scilicet fugare animalia. (f. 45, b.) fugabit et habebit Drofmete. (ff. 126, 134, b.) pro animalibus fugand' Cant' ad lardar' ad festum Sancti Martini viii<sup>d</sup> (Add. 6159, f. 41, b.)

Bestes thai brac and bare;  
In quarters thai hem wrought;

Martirs as it ware,  
That husbondmen had bought.  
(Sir Tristrem, I. 42.)

Instead of the last word we should read *brought*. The meaning appears to be that the hunters divided the deer into quarters, as though they were Martinmas beeves, which the tenants had brought in.

burdensome when fulfilled by the removal of so much wool, or cheese, or corn, or bacon, to a neighbouring town; but they became serious when a tenant had to ride or drive from the heart of England to the coast and home again. When fish was wanted at Rochester, the tenants of the four hydes of Hedenham and Cuddington, which are near Aylesbury, were called out; two of the hydes brought the fish from Gloucester into Buckinghamshire, and the other two hydes carried it on to Rochester:\* it is likely that they were sent to fetch the dainty lamprey, still sought for at Gloucester. The *langerodes*, or long journeys,† were very troublesome to the tenants, but could not be dispensed with while there were no regular mails, and no public conveyances. A person undertaking a *langerode* either received some remuneration or worked out his rent by serving as a carrier; in general he was not inclined to leave his home and farm, and found it more convenient to pay the price of the service, which enabled the lord to find another carrier. No services were more frequently commuted than the duties of arriage and carriage, and a body of professional carriers was gradually formed by the habit of constant commutation.

We shall attempt to describe the grand operations of tillage, of the corn and hay harvest, and of sheep-shearing in another number.

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ART. II.—PRISON DISCIPLINE: THE PRESENT  
STATE OF THE QUESTION. BY PROFESSOR  
MITTERMAIER.

THE question as to the prison discipline best suited for the attainment of the desired end, has latterly assumed a substantially different aspect, so that we may now begin to

\* *Customale Roffense.*

† *Unum averagium debent in anno quod vocatur langerode.* (Harl. 3977, f. 98.)

reckon on the possibility of arriving at a better understanding on the subject. The old disputed question, whether the system of associated imprisonment, or that of solitary confinement, is to be preferred, and how the former might be amended, disappears, giving place to a general conviction, the result of recent investigation, that solitary confinement must be recognised as an indispensable part of all prison discipline. The question at present is rather whether solitary confinement should be adopted as the general and only system in carrying out the entire execution of sentences of imprisonment, or whether it should be employed only for a part of the sentence. Thus, all criminals being condemned to solitary confinement, though only for a term, that term might be either fixed by law, or it might be left to the discretion of the prison authorities to decide when it might be desirable to admit the convict to associate with other prisoners. The views existing at present in Germany, Switzerland, and Italy, will be best seen by treating—

1st. Of what has been effected by philosophical inquiry.

2ndly. What by legislative decree.

3rdly. What by means of the lessons of experience.

I. It must be acknowledged that, in all recent philosophical and legislative inquiry on the subject of prison reformation, it is important to duly test the results of the methods adopted in England and Ireland. With regard to England, the recent reports and writings of Sir Joshua Jebb, (*“Memorandum on Different Questions Relative to the Management and Disposal of Convicts:”* London, 1861,) have been consulted. In Germany especially, Sir Joshua Jebb's labours in prison reformation are highly appreciated. Still, in his late publication he makes important acknowledgments, *e.g.* p. 21, on the danger attending the admission of prisoners to intercourse with others, even after long isolation, and on the great difficulty of laying down a discipline offering sufficient guarantee. It is to be regretted that Sir Joshua Jebb should be so decidedly opposed to the Irish, or intermediate system, and



it is to be feared that, in some respects, he is occasionally involuntarily biassed by a certain jealousy that exists between the English and Irish; though it must be confessed that, although a system may work well in one country, great prudence is requisite in introducing it into another, and perhaps the non-existence in England of many of the police regulations of Ireland may tend to make the English system more efficient. It is evident that in Germany, Italy, and Switzerland, the Irish system of prison discipline is more and more appreciated. The reports of the Director-General, Capt. Crofton, have excited great attention, as have also those made by the other excellent and experienced men at the Dublin Congress of the Social Science Association, and especially the admirably practical exposition delivered by Capt. Crofton at the Congress, which made a great impression in favour of the Irish system.

Another English publication has likewise been read with great interest, viz., "The Prison Chaplain," a memoir of the Rev. John Clay, in which an important comparison is made between the English and Irish systems with regard to the probationary ticket of leave, and in which (pp. 418—442) the defects of the English system are practically developed: showing, at the same time, that by means of the probationary ticket of leave, the Irish system affords a better guarantee for public security than can be reckoned upon by the English.

Among the recent publications in Germany since 1861,\* the following on prison reformation deserve especial mention. 1. A series of publications has appeared respecting the regulations of the Moabit prison in Berlin, according to which the entire administration is confided to the members or Brothers of the so-called "Rauhen Haus," and they are consequently

\* With regard to those published before 1861, the author of the present Report begs to direct attention to his two publications on "Prison Reformation." Erlangen, 1858. "The present State of the Prison Question." 1860.

the acting overseers and workmasters, under the direction of Herr Visschers, known in England as head of the prison administration in Prussia. Professor Von Holtzendorf,\* who was listened to with so much interest at the Dublin Congress, has rendered fresh service by showing, in various publications, from hitherto unknown sources, that these Brothers of the "Rauhen Haus," forming in reality a religious order, may easily become prejudicial in a prison where they alone have the direction, for experience shows that they too generally act from one-sided views; being too much under the influence of a religious, pietistic mysticism, to succeed in the reformation of convicts, they are far too apt to make hypocrites of them, whereas experience proves that nothing but a practical method of straightforward reformatory progress can succeed with criminals. This attack upon a system favoured and upheld by many influential persons, called forth many publications in defence of the Moabit system, especially endeavouring to prove that the apprehensions entertained on the subject were unfounded and imaginary.†

2. A work of Schuck's‡ is worthy of attention. He was himself prison guardian for thirty years, and afterwards for several years Director of Moabit, but was removed, it appears, for not yielding implicitly to Herr Visschers. Herr Schuck defends the Moabit regulations, and in so doing unjustly opposes the appointment of subaltern officers (*Unteroffizieren*) as sub-directors of prisons. His book, however, deserves attention, for the importance his experience induces him to attach to the separate system; for the comparison he draws between the two prisons of Bruchsal and Moabit, both built on the separate principle; and for certain important observa-

\* "The Brethren of the Rauhen Haus, a Protestant Order in the Service of the State," by Von Holtzendorf. Berlin, 1861.

† Such as, "The Brethren of the Rauhen Haus," by Herr Oldenberg, Pastor of Moabit. Berlin, 1861. "The Separate System in Prussia," by Böhlau. Weimar, 1861. "The Cellular Prison Moabit," by Ortloff. Gotha, 1861.

‡ "The Separate System as Practised at Bruchsal and Moabit." Leipsic, 1862.

tions, such for instance as on the reformatory training of the convict under the separate system, and on insanity.

3. The late publication of Fuesslin\* must be signalised, the author having been for many years Director of the Bruchsal Prison, in which he took an active part in introducing the separate system. He likewise shows how unfounded are the assertions that have appeared in many of the public papers against the efficiency of isolation as practised at Bruchsal, and how unjust it is to charge that system with producing so many cases of relapse.

4. A work of Götting† upholds the separate system as that best adapted to work moral reformation, and shows in what consists the reformation that can be effected in a prison by means of isolation.

5. A useful work is that by Bauer,‡ for many years Superintendent of the House of Correction at Bruchsal, and who especially directs the industrial department. The dictates of his experience are valuable as to the good resulting from employment being given likewise in solitary confinement; he considers it a means of moral reform.

6. Von Holtzendorf, who labours with so much zeal in the cause of prison reformation, tests, in one of his works,§ the Irish probationary ticket-of-leave system, showing the principle on which it is based, and proving the fallacy of the opposition raised against it on the ground that thereby a sentence of condemnation for a fixed term loses both in dread and force. The author shows that probationary liberation quite accords with the intention of the law in passing sentence of condemnation—that the judge may err in adjudging the penalty, and that in allowing a certain discretionary power,

\* "The Recent False Charges against the Separate System through Misrepresentations of the Results of the System as adopted at Bruchsal." Heidelberg, 1861.

† "Justice, Life, and Knowledge. For the Educated of all Classes." Hildesheim, 1861.

‡ "Industrial Labour in Prisons." Carlsruhe, 1861.

§ "Discretionary Mitigation of Sentences of Condemnation." Leipsic, 1861.

depending on the conduct of the convict, we have one of the best means of ensuring a just degree of punishment. The defects he points out in the English regulations, and the conditions he suggests to render probationary liberation efficacious, deserve the attention of English jurists.

7. Dr. Gutsch, physician of the Bruchsal prison, publishes his collected experience on the development of insanity under solitary confinement.\* He acknowledges that a considerable number of such cases have occurred at Bruchsal, but that it would be very unjust, on that account, to depreciate solitary confinement as a principle. After careful investigation, it is evident that one half the cases of insanity were of a slight character and curable, that the cures were in the proportion of seventy per cent., in five cases the convicts being decidedly insane on arrival, and the surgeon alone was to blame, who, either from ignorance or negligence, pronounced the individual accountable. In forty-four cases there was evidently a predisposition, independently of imprisonment. In all cases suitable measures were promptly adopted. One cannot, however, agree with the author in advocating that the convict showing symptoms of derangement should continue in the prison, instead of being removed to a madhouse.

Among the works that have appeared in Italy on the subject of prison reformation, the following deserve attention.

1. Observations of Director Ambrosoli,† who decidedly pronounces in favour of the separate system, though with the proviso, that the term of isolation should not be too protracted, and that it should rather be employed at the commencement of imprisonment, and with due regard to the best means of ensuring the moral reformation of the convict. Probationary liberation, as a reward for exemplary conduct, he thinks worthy of recommendation.

\* "On Insanity under the Separate System. From Facts Collected in an Experience of Twelve Years in the Prison of Bruchsal." Berlin, 1862.

† "On the Penal Code of Italy." Milan, 1862. P. 49.

2. An important publication is that by Sig. Girolamo,\* who has been for many years Governor of the Lunatic Asylum at Pesaro, and has consequently had the best opportunities for observing the narrow boundary that often exists between crime and insanity, and how necessary it is to study the laws of the development of human nature, in which similar causes often lead either to crime or insanity. The author shows, in a mass of practical observations, how easily the judge may err, and how necessary it is in passing sentence to have due regard to the individuality of the convict. He pronounces for the separate system; but applied judiciously, isolation acting so differently on different individuals. He very ably shows that the education of the convict in prison ought to be in many respects analogous with the treatment of insanity in a mad-house, and therefore how important it is that the governor of a prison, as well as the physician, should have been trained to physical investigation of human nature. He likewise approves of probationary liberation and the intermediate system.

3. Two works on the efficiency of the separate system in Tuscany are worthy of attention. A physician, Sig. Morelli,† wrote in 1859 a treatise denouncing cellular imprisonment, giving his own experience in the prison of Volterra, with various statistical data, in proof of the deteriorating effect of the system, both physically and morally, and of its by no means answering the desired purpose.

In reply to this last, the Governor-General of the Prisons in Tuscany,‡ Sig. Peri, makes it evident that Sig. Morelli's statements are exaggerated. It must be allowed, he admits, that much was to be complained of in the Volterra prison as to the locality, but that the Government had not delayed to

\* "On Penal Condemnation according to the Modern Penitentiary Systems; and on the Application of Criminal Law." Florence, 1862.

† "Sanitary Essays on the Penal Régime under the Separate System." Florence, 1859.

‡ "Reply of Sig. Carlo Peri to the Treatise by Dr. Morelli." Florence, 1860.

remedy the existing evils, and that, in general, the facts of experience were in favour of the separate system.

These two publications must be considered together. Although Sig. Morelli may be reproached on the one hand with exaggeration, and on the other with passing over in silence what has been done by the Government, yet his publication is important for showing, as it does, how little success can be reckoned upon in adopting the separate system in old prisons, patched up to serve for the purpose, and in which the necessary precautions cannot be taken to prevent injury to the health of the convicts.\*

II. With regard to what has been effected legislatively in the domain of prison legislation, we would particularise the following :—

1. The Bavarian Law of November 10th, 1861, On the Punishment of Criminals by Solitary Confinement. In Bavaria the opinion has been more and more gaining ground, that the associated system of imprisonment can hardly fail to act more or less injuriously on the convict, and can only to a certain point be reformatory. Even in the prison at Munich, in which Herr Obermaier laboured so zealously, the increasing number of murders perpetrated among the convicts, especially of those suspected of being informers or traitors, showed that he himself was under illusion as to the success of his system.

In Parliament the old system was constantly attacked, and the introduction of the separate system demanded. In revising the penal code the Government could not remain indifferent to the increasing preference given to the separate system, but it was thought desirable, before deciding definitely for the future, to obtain some experience in their own country

\* A work by Advocate Costi of Athens should not be passed over in silence, in which he communicates to his countrymen the results of the investigations and efforts in prison reformation published in England and Germany, earnestly pointing out the need of reformation, and the advantages of the intermediate system and the probationary ticket of leave. "Observations on Prison Discipline." Athens, 1862.

on the results of isolation, and thus the said law of November 10th, 1861, was passed by way of transitional experiment. It decreed:—

A. That buildings should be erected on the cellular system for men only. For women, isolation was not deemed applicable. It was to be tried upon convicts whose sentences varied from two months to five years, but not beyond. Caution was to be observed in not adopting it for convicts who appeared either physically or morally incapable of bearing it.

B. The sentence of solitary confinement was not to be executed with the extreme rigidity practised at Bruchsal or Moabit. True, (Art. 3,) each convict was to be kept to his separate cell, excepting for the time requisite for exercise in the open air, public worship and education. These exceptions rendered the isolation less absolute than at Bruchsal.

C. By way of encouragement in the reformation of convicts, it was proposed (Art. 8) that those who had shown symptoms of amendment after a year's solitary confinement should, the better to ensure the durability of their reformation, be admitted to work with others.

D. Since it must be confessed that isolation is an intensely severe penalty, Art. 12 suggests, as a possible alleviation, that in sentences to solitary confinement the term might be reckoned in the proportion of two days of isolation as equivalent to three of associated imprisonment. This, however, not for the first six months.

E. By way of experiment in further carrying out the separate system, it is added, (Art. 12,) that in the old prisons there should be a certain number of cells prepared, in which convicts, without distinction of sex, shall be kept separate for six months from the time of their entrance, or for longer, with the consent of the convict.

2. In the Kingdom of Hanover (1st February, 1862,) a bill was brought into Parliament for the introduction of the separate system. This can only be considered as a partial measure, it not being possible for some time to introduce it generally.



A. The bill proposes that isolation should be enforced in all penal sentences ; for, once its efficiency admitted, there is no reason why it should not be the general rule.

B. Convicts showing less moral depravity should, by preference, be isolated.

C. On the term of isolation they were not prepared to decide, but the general opinion was that it should not exceed three years.

D. In consideration of isolation being so hard to bear, the law admits of a reduction of the term proportioned to the criminality of the convict, so that in a sentence of three months' imprisonment, one day of isolation shall reckon as two days of the common prison. In the house of correction, for a sentence of one year, three 'days' solitary confinement shall be equivalent to four under the old system.

3. In the new penal code for Bremen the separate system is decreed, and every effort is made to render it efficient as a means of reformatory progress—adopting it likewise for the whole of the sentence. The project is to have only one prison, in two divisions—the one to be the house of correction, and the other for the prison. During public worship the convicts are to be kept separate. A fixed term of isolation, as in Baden, for six years, is not decreed. By a resolution of the committee of inspection, isolation may be suspended for the convenience of associated labour for convicts, under a sentence of six months or less, having already had a month's imprisonment, at their own express request, and when there is no ground for fearing a bad influence ; likewise, by way of trial, for correctioners who have been in confinement eighteen months, if they show signs of amendment.

4. Three of the Swiss cantons—Aargau, Neufchatel, and Basle—have recently declared for the separate system. The principal prison is to be in Aaran. Chief Justice Welli has the merit of convincing his countrymen of the advantages of the separate system and of procuring the erection of a new prison. A high premium was offered for the best plan, and

the building is progressing rapidly. It is planned so as to meet all requirements, both for associated and solitary imprisonment; certain of the cells being only for sleeping, as during the night all are to be kept separate; other cells of larger dimensions serving for day and night. In Neufchatel and Basle prizes were likewise awarded for the best models.

5. The city of Frankfort has likewise offered a similar premium for a plan according to regulations drawn out by the experienced Herr Varrentrapp, in which the separate system is to be more thoroughly carried out than in Switzerland.

6. In Italy, two states only can be named as having seriously entered upon a system of prison reformation, viz., Tuscany and Piedmont.

As already mentioned, the separate system was adopted throughout Tuscany in the year 1849, and the Governor-General, Sig. Peri, laboured most successfully in its establishment. We have, however, already shown likewise that it called forth much opposition, especially through the writings of Sig. Morelli. In 1859, Tuscany was united to Piedmont, and in September of the same year the Provisional Government appointed a commission of inquiry with regard to prison discipline. Their report was to the effect, that it were a crime to think of returning to the old system, but that, at the same time, absolute uninterrupted isolation, especially for the southern temperament, was not desirable; that the sentence should be divided into three periods. 1st. Complete isolation for a fixed term. 2nd. Associated, but solitary for the night. 3rd. Agricultural labour in appropriated localities. On the 10th January, 1860, the Government decreed the cessation of capital punishment, also that convicts sentenced to imprisonment should pass the whole term in solitary confinement; those sentenced to hard labour to be isolated the first half of their term; those sentenced to the house of correction for the rest of their lives, to be isolated for the first ten years, and then admitted to work with others, constant silence being enforced.

It is to be mentioned that, from May, 1858, an attempt has been made in Tuscany for the establishment of a penal colony on the island of Pramosa, that convicts from the different prisons, who may be found worthy of it, should be rewarded by being removed there to work in the open air, thus instituting an intermediate prison, as in Ireland. According to communications received by the author of the present report from Sig. Peri, the organization is very good. There are 130 convicts on the island, and hitherto there has been no disturbance.

In Piedmont, in 1847, the separate system was adopted in the principal prisons, for the night, while during the labours of the day silence was enforced. In 1857 interesting discussions took place in Parliament on the separate system, and many were in favour of it, but it was adopted only for criminals under examination and convicts sentenced for six months. Further application of the separate system is still opposed in Piedmont. In 1861, a new prison was built at Cagliari, and the necessity of reforming the prison discipline throughout the country was brought before the Government, and the result was, that on the 16th February, 1862, a commission of nine members was appointed by the King for inquiring into the subject, two of the members being Sig. Peri and Sig. Vegezzi Ruscalla, who had both laboured so zealously for many years to obtain the most suitable methods for carrying out the separate system. One of the duties devolving on the commission was that of proving whether the penalty of hard labour on board the hulks or galleys is, or is not, consistent with the present state of civilization, and the progress made in penal modification, especially as compared with the sentences grounded on the penitentiary system—in case of their showing being negative, what penalty should be substituted. Further, whether it were not desirable to concentrate all the prisons, including the hulks, under one administration. The researches of the commission were also to be directed to the different penitentiary systems, and to decide which was the best—

especially they were to consider the sort of buildings best adapted for the efficient working of the penitentiary system. Finally, they were to show whether penal agricultural colonies are desirable, as a gradation in the penalty, or whether it might not be arranged that such penal colonies should be employed, by way of mitigation, for convicts whose good conduct might deserve it. Much is to be hoped from the investigations of the commission.

We have to add also, that on the 27th January, 1861, a code of prison regulations, containing 331 paragraphs, was issued for the Kingdom of Italy.

III. As regards experience on the subject of prison discipline; it is a cause of complaint that, owing to the Governments keeping the executive power in their own hands, much, especially with regard to prison administration, is kept secret, and consequently nothing can be known of the working of the separate system as is the case in England, Scotland, Ireland, and Switzerland. The prison directors give in their annual reports to the ministry, but these reports remain official secrets, and are never published—the prison *employés* are even bound by oath to make no communications to third parties. Thus important facts cannot be turned to account, and the press is deprived of a principal means of censuring error, and of exposing prejudices and misunderstandings with regard to new and improved systems. In Prussia, latterly, an official notice\* on prisons has been published, but one cannot be satisfied with this way of enlightening the public. Such reports can only attain their end when, as in England, Ireland, and Scotland, the director, as well as the pastor and the physician, give in their separate reports, with their individual observations and experience. Thus, the citizen possesses the direct testimony of the prison officers—whereas, after the Prussian manner, Herr Visschers only, as Governor of the Prisons, makes a

\* “Communications from the Official Reports of the Prussian Royal Prisons under the Jurisdiction of the Minister of the Interior; During the Years 1858, 1860.” Berlin, 1861.

general statement, in which he quotes certain passages from the reports of the several officers, as may appear fitting to him from his own point of view. There is much to condemn in the Prussian prison regulations. The ministry had announced to the members of parliament, that the Government authorised the trial of the separate system in one of the prisons, through a special order of administration, though as a system it was not recognised in the law of the country. It would seem that the proposed changes do not accord with the spirit of the constitution. In Prussia, likewise, the prison administration most inexpediently comes under the jurisdiction of two different ministers — those in which are confined prisoners under examination and convicts under sentence, fall under the jurisdiction of the Minister of Justice ; while the houses of correction and prisons in which convicts sentenced for longer terms are kept, fall under the jurisdiction of the Minister of the Interior. It is evident that thus no uniform and suitable system can be acted upon in any of the Prussian prisons. Only in the Moabit Prison in Berlin is the separate system used for criminals sentenced to the house of correction, and they should be between the ages of eighteen and forty-five, and such as it may be deemed advisable to isolate entirely, day and night. It is evident that from experience obtained in such a prison, in which, moreover, the convicts for the separate system are selected, no decision can be arrived at as to its being really injurious. It was stated above that the overseers in this prison are all Brothers of the Rauhen Haus, and that this circumstance creates dissatisfaction. The principal German prison built upon the separate system is that of Bruchsal, in Baden. To that are sent convicts sentenced to the house of correction, not, however, for longer than six years, so that at the expiration of this term the convict passes into the common prison, unless he prefer to remain isolated. Experience shows favourably for the result of the separate system as conducted in Bruchsal, in that it has a decidedly reformatory influence on the convict. Though it is not to be denied that several of

the liberated from Bruchsal have relapsed, yet the number is not so great as from other prisons, and the blame in many cases no doubt lies rather in the want of proper establishments where the liberated could be suitably employed and guarded. It was mentioned above that, according to the report of the officiating physician, insanity often ensued at Bruchsal. It is, however, shown that in 1860 there was only one case of insanity, and in 1861 none at all.

The Government is willing to grant tickets of leave to such convicts as, either from physical or moral causes, could not safely be committed to solitary confinement; likewise in many cases clemency has been shown on account of good conduct, and the remainder of the sentence been remitted. In 1860 there were thirty-five such cases. In 1861 there were twenty-five. The most remarkable fact is, that each year the number increases of those who, having been in solitary confinement six years, might be admitted into the common prison, yet prefer continuing in their cells—this is a satisfactory testimony to the preference given by the convicts themselves to the separate system. In 1859 there were ten such cases.

Satisfactory experience has been made in the prison of Vechta in Oldenburg, in which the very zealous Director, Hoyer, has effected much in the reformation of criminals. Latterly, convinced of the advantages of the Irish intermediate prison, considerable acquisitions of land have been made in the neighbourhood of the prison, enabling them greatly to improve their discipline—the gradations of which are: isolation at first, to which all are committed for a longer or shorter period: where there are proofs of decided and durable reformation, the convict may be removed into the intermediate prison, in which the treatment is milder, combined with the privilege of working in the open air: in case of bad conduct the convict returns to his former class. Facts speak much in favour of this prison. But few of the liberated have been recommitted, and they have been chiefly imbecile and indifferent, or convicts

## 26 *Prison Discipline: The Present State of the Question.*

that had been in other prisons and become more and more depraved through bad association.

We have yet to observe that a Prussian "Prison Association" in Rhenish Westphalia publishes an annual report, in which the resolutions passed by Government are given, and important facts communicated, showing the serious necessity there is for prison reformation, with accounts of the condition of different prisons, often accompanied by severe criticisms of their defects and deficiencies. One signal service this association renders is, its taking upon itself the presenting of petitions to the ministry.

The general result of the views entertained by the true friends of prison reformation in Germany, Switzerland, and Italy, is the conviction that the separate system, well organized, can alone strike at the root of the evil; that considerable misunderstanding still prevails as to the object aimed at in the separate system—the principle not being sufficiently recognised that the end proposed by the penalty ought to be the reformation of the criminal. This was most ably demonstrated by the Attorney-General of Ireland, Mr. O'Hagan, at the Dublin Congress of the Social Science Association.\* "While the prison," he says, "should ever retain its dread character of justly incurred penalty, still there must be combined with this severity the endeavour to reform the convict."

Everywhere it is becoming better known that where the introduction of the separate system has not appeared successful, the Government has been to blame, in dealing with half measures—from mistaken economy, neglecting the means and regulations on which depend the success of the separate system. Blame likewise rests with the prison officers, who do not enter into the spirit of the new system—they cannot understand that reformatory education, adapted to the individuality of the convict, is the desired aim in the separate system.

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\* *Transactions*, 1861, p. 61.

## ART. III.—GENERAL AVERAGE.

OUR readers are no doubt aware, from the two articles on General Average which have appeared in the *LAW MAGAZINE*, that an attempt is being made, chiefly by mercantile men who are practically conversant with the subject, to bring about uniformity, or at least some approximation to uniformity, in that portion of the Law Maritime of this and other countries which relates to the important subject of general average.

The inconvenient and even absurd results which follow from the want of uniformity on the subject must be very striking to mercantile men. The act or loss which gives rise to the right of general average, such as the jettison of cargo, or the cutting away of masts, is one that takes place on the high seas. The persons jointly interested in this act—the owners of the ship and cargo—are, as likely as not, persons of different nations. The contract which has for the moment bound them together, the contract of affreightment, is a contract which is commonly entered into and takes its inception in one country, while it is to be carried into completion in another country. These things being so, it would seem theoretically reasonable that the results which should follow upon the jettison or other act done for the common good ought, so far as the effect of laws is concerned, to be precisely the same, whether the ship's head happens, at the time when that act is performed, to be turned eastward or westward,—whether the ship is on her way from New York to London or from London to New York. There is, in fact, a close analogy between a jettison or similar act and marine salvage. Questions of salvage are settled in the Admiralty Court on principles of international, as distinguished from municipal law; and it is not easy to see why it should not be the same with questions of general average.

It may perhaps be thought that, however valid such reasoning as the above may be as a matter of pure theory, the difficulty of carrying it into practice would be insuperable. Granting, it may be said, the advisability of having one uni-



form system, were it possible to begin *de novo*, yet how will it be possible to force into harmony systems of law which probably set out from the very beginning on distinct and contradictory lines of thought? To the difficulty thus started there is, with reference to the subject on hand, a ready answer. Fortunately for the advocates of uniformity, it is the fact that the sea-laws of all European countries, and adoptively of America, have one common origin; and all, to a considerable extent, agree in their leading principles, notwithstanding their somewhat wide divergence in the application of those principles. The common origin is that supposed fragment of Rhodian law which is incorporated into the Roman Civil Law. The agreed leading principle is, "omnium contributione sarciatur quod pro omnibus datum est." There is then a standard of universally admitted authority to which every question in difference may be referred.

These few observations have been made in order to dispel any suspicion which might lurk in the minds of our readers, that the task which these maritime law reformers have taken in hand is Utopian. We now proceed to lay before them the draft of a Report which has been prepared in pursuance of this aim.

From the Report of the Proceedings of the National Association for the Promotion of Social Science, held in Glasgow in 1860, it appears that, at the invitation of the chairman of the General Shipowners' Society in London, of the chairman of Lloyd's, and of the chairmen of various influential bodies in London, Liverpool, Glasgow, and Hull, a body of delegates from various parts of the world met together at Glasgow. There were representatives specially appointed by the chambers of commerce, boards of trade, and underwriters' associations, of Amsterdam, Antwerp, Bremen, Copenhagen, Lisbon, and other continental seaports. Nor was the interest taken, or the attendance, confined to Europe. Boston, New Orleans, and New York, also sent their representatives. It was at that time possible for the two cities last named so far

to work in unison as to adopt the same representative; the person chosen for that purpose being the very able and very learned judge of the Key West Admiralty Court, the Hon. William Marvin.\*

The immediate result of this meeting was, the adoption of certain resolutions, and the appointment of a committee for the carrying out of the objects in view. Since then, the subject has not been allowed to sleep. A second general convention of English and foreign members met this summer in London. Some changes were made in the constitution of the committee, but the work, though still in the underground stage of preparation, is, we believe, steadily going on. As some sort of earnest of what may be expected, we are at liberty to lay before our readers the draft of a Report which has been adopted by the English section of the committee, and is being circulated among the foreign members, for purposes of further discussion and as a basis for eventual agreement.

## REPORT.

### SECT. I.—PRELIMINARY OBSERVATIONS.

It is highly desirable that there should be uniformity in the

\* In the current number of the *Home and Foreign Review* there appears an article on General Average which will repay perusal. It is however disfigured by a too obviously insular tone, and by some inaccuracies, which show that the writer is not well informed on the recent history of the question. For instance, the meeting at Glasgow, and the efforts to prepare a uniform code of general average, are attributed to the Glasgow Chamber of Commerce, a body which, singularly enough, was one of the few public institutions connected with shipping interests not represented on the occasion. It is also averred that Lloyd's have held aloof from the proceedings; whereas we are bound to say that Lloyd's sent two representatives to the Glasgow Meeting, and that the committee of that important body had taken measures to be represented at the Social Science Congress in June last, (when the draft bill on General Average was discussed,) but that unfortunately the delegate chosen for the purpose was prevented giving his attendance by an unavoidable accident. This mistake in the article we have alluded to is so far satisfactory, inasmuch as it demonstrates that the writer, however competent in other respects, does not in any way speak the voice of Lloyd's, and is not even acquainted with the movements of its committee,—though some expressions in another part of the article might lead a hasty reader to a contrary supposition.

law and practice of general average amongst all maritime communities.

There are two distinct causes of the diversity which at present exists; one, that in some countries there is inconsistency in the carrying out of leading principles; the other, that there is difference of opinion amongst different communities as to the leading principles themselves; so that, assuming each to follow out its own principles consistently, there would still be a divergence in the results.

Of these causes, it would be comparatively easy to remedy the first; but the work aimed at by the committee would be incomplete unless both were remedied.

In the opinion of this committee, the object aimed at should be, to determine which among the leading principles propounded are the true ones, and to found a uniform system on the consistent application of those principles.

They think, therefore, that in order to prepare sufficient material for carrying out the objects of the committee, it ought to be determined, 1st, what ought to be the leading principles of general average; and, 2ndly, what is the true and self-consistent application of those principles to classes of individual cases.

They think that the following order of arrangement should be observed:—1st, to define the leading principles of general average; and, 2ndly, to consider in detail the more important disputed points; beginning with those which bear on the question, what claims are, and what are not, admissible as general average, either first as sacrifices, or secondly as expenditures, and passing on to those which concern contributing values and the mode of settlement.

## SECT. II.—LEADING PRINCIPLES.

1. General average is a contribution made on behalf of property exposed to risk in a maritime adventure, to replace certain losses or expenses which have been incurred for the common benefit.

2. In order to found a right to contribution, the act which gives rise to such loss or expense must be one that is beyond the duties undertaken by the shipowner as carrier under the contract of affreightment.

3. Under that contract, the shipowner usually undertakes to deliver the cargo at its place of destination, in the like good order as when shipped, "the accidents of navigation," or words to the like effect, "excepted."

This undertaking must not be understood as meaning that the carrier is obliged to deliver the cargo unless the accidents of navigation prevent his doing so, *i.e.* make it physically impossible that he should do so; nor yet, on the other hand, is it to be understood as meaning that the mere happening of some "accident of navigation" shall be treated as releasing him from all obligation.

The true view, in the opinion of this committee, is, that upon the occurring of any accident, the carrier, by himself or his servants, is still bound to do what is "reasonable" towards carrying out his contract; but he is not bound to make any step which, though in his power, it would not be reasonable to require of him.

It is reasonable to require him to use, or suffer the use of, the ship and her tackling in that kind of service for which they were constructed, and this although the doing so may expose them to unusual risk. It is not reasonable to require him to destroy or permit the destruction of any part of either; nor yet to expose either to unusual risk in a kind of service for which they were not constructed. It is reasonable to require him to bear all ordinary expenses in the direct course of the voyage. It is not reasonable to require him to bear extraordinary expenses caused by a deviation from that course made for the common safety.

If the ship is damaged by an accident, it is reasonable that the shipowner should repair her at his own expense, and that he should do so as soon as he has the opportunity, without waiting till the end of the voyage.

Up to this point, they think that there is a common practice of the sea; in other words, such a general concurrence as may be taken as evidence of reasonableness.

They think it is reasonable, further, that when an article is by its own default the cause of the danger which renders its sacrifice necessary, such an article may be sacrificed without compensation.

4. All accidental damage suffered by the ship must be borne by the shipowner alone: all accidental damage suffered by the cargo must be borne by the cargo-owner alone.

5. Loss caused by an act which is not within the obligation of the carrier as defined above, and which is done for the common safety of the ship and cargo, must be made good as general average.

6. In order effectually to carry out Articles 4 and 5, it is necessary to have some rule which shall define to what extent the consequences, more or less remote, whether of an accident or of an act of volition, shall be ascribed to the accident or the act.

This rule should be the same for accidents as for acts of volition. That is, to whatever extent the consequences of an act of volition as above should be made good by contribution, to a corresponding extent should the consequences of an accident be excluded from contribution.

The rule which should be adopted for this purpose is, that no other consequences shall be taken into consideration except those which must follow the accident or the act by direct physical necessity, independently of any subsequent contingent event or act of volition.

It will be found upon examination that no less stringent rule will be adequate to keep the results of accident and those of acts of volition clear and disentangled from one another.

The great majority of general average acts take place as consequences of some previous accidental damage suffered by the ship—as jettisons, or putting into port, because the

ship has sprung a leak; and they are done under a species of moral necessity resulting from that accident. If, notwithstanding this, it is right that there should be a contribution, *i.e.*, that the morally necessary consequences of accident should not be connected with the accident, the same rule should be applied to the morally necessary consequences of an act of volition.

The maxim, *causa proxima non remota spectatur*, is applicable, therefore, to the international law of general average.

7. There is a difference of opinion on the following question:—

In order to constitute a general average act, should the motive for it be “the common safety,” in the sense of safety from the danger of total loss, or “the common benefit”—in other words, the completion of the common adventure?

Supposing, for example, that at a given point in the voyage some portion of the property is in physical safety, but that it is necessary to make some sacrifice, or incur some extraordinary expense, in order that the ship and cargo may reach their destination in company, ought the portion which was then so far in safety to contribute as for a general average?

The existing English practice is based on the opinion that it ought not. Some consider this opinion erroneous.

The argument in support of the English practice is:—

Contribution should be in proportion to benefit intended or derived. If the alternative of the act be a total loss, that benefit is represented by the full value of the property: if otherwise, it is represented by the difference between the position of the property in case the act be performed, and its position in case the act were not performed. In the case supposed, some portion of the property is already in safety, and consequently is either not benefited at all by the act, or at least not benefited (as the remainder is) to the full extent of its value. Consequently, such portion should not contribute, as to a general average, upon its entire value.

It has been argued on the other side:—

By the contract of affreightment, so long as it remains in force, the ship and cargo are so linked together during the voyage that neither of them can be said to possess any pecuniary value at any middle point in it; for the shipowner cannot withdraw his ship, nor the cargo-owner his cargo, so as to derive any pecuniary benefit from it, until the termination of the adventure. Hence an act, which has for its object the completion of the voyage, may be said to redeem both ship and cargo from a state of pecuniary worthlessness, and so to benefit both, together with the freight, to the full extent of their respective values.

To this it is answered:—The question, whether benefit has been derived from an act, can only be determined by supposing an alternative, and considering how the case would have stood had the act not been done. Here, had the act not been done, the contract, quoad the original ship, would have been at an end; for it would then have been impossible that the goods should have been carried in the original ship to their destination. In that case, some portion of the cargo would exist in physical safety, set free from the contract, and having some pecuniary value.

It is replied:—That is not so; but, if the act in question be not done, the contract still subsists, and all parties are therefore at a dead lock, for neither shipowner nor cargo-owner would have a right to touch his property. Hence, an act which removes this state of things is an act which benefits the whole property to the entire extent of its value.

It will be found that this controversy affects several practical questions.

### SECT. III.—DEFINITIONS.

In conformity with the principles laid down in Sect. II. the definitions suggested are as follows:—

8. *A general average act* is an act which is outside the carrier's duty to the cargo under the contract of affreightment; which, in consequence of extraordinary danger, cannot

judiciously be left undone ; by which is contemplated extraordinary expenditure, or the sacrifice of such property as is not through its own default itself the cause of danger ; and for which act the motive is—

(On one view) the common safety of the ship and property on board.

(On the other) the arrival of the ship and cargo in company at the port of destination, or at the nearest port thereto which it may subsequently be found practicable for them to reach together.

9. *A general average* is a contribution which is to be made (the property sacrificed, if any, taking its share rateably with the part preserved) to replace whatever loss or expense is the direct and necessary effect of a general average act.

#### SECT. IV.—SACRIFICES.

Following the order of arrangement laid down in Sect. I. the committee passes on to the disputed points bearing on the question—what losses are, and what are not, admissible as general average. These may be divided into two classes—Sacrifices, and Expenditures.

##### *A.—Sacrifices of Cargo.*

10. *Cargo sacrificed on account of its vice propre.*—Cargo which is jettisoned or otherwise sacrificed because from its own putrefaction, or from sea damage suffered by it, it has become dangerous or unfit to be carried, as heated hemp jettisoned for fear of ignition, ought not to be made good by contribution.

For, the article is by its own default itself the cause of the danger.

11. *Jettison of deck cargo.*—In trades where there is a custom to carry goods on deck, as in the timber trade, and with live stock in certain coasting voyages, is the jettison of such articles allowable as general average ?



Some contend that cargo which is thus carried in its customary place, cannot be said to be in an improper place, and consequently ought to be made good if sacrificed. Others think that on account of the difficulty of determining the questions as to custom which might arise, deck-load jettison should be excluded in all cases.

Cargo carried in a poop or deckhouse which is built in with the frame of the ship, and cargo carried in the cabin, where the doing so is customary, should be treated as underdeck cargo. Cargo in temporary deckhouses, or houses other than the above, should be treated as on deck.

12. *Damage to cargo in effecting jettison.*—On principle, all damage which the cargo necessarily suffers as the effect of making a jettison for the common safety, ought to be treated as a part of the loss by jettison.

Hence, if a sea is shipped while the hatches are opened to effect a jettison, and the water going down the opening damages other goods, all damage which can be clearly traced to this cause is on principle allowable as general average.

As a rule of practical convenience, however, it would perhaps be well to exclude such claims, on account of the difficulty of proving the real cause of damage, and the abuses to which that difficulty may give rise.

Damage done to cargo from the derangement of stowage consequent on a jettison, as by chafing and breakage of flour barrels loosened by removing portions of the tiers, is not allowable as general average. This is on the ground that it is an uncertain and remote consequence of the jettison.

13. *Damage to cargo by a forced discharge.*—If cargo is discharged into lighters to float a stranded ship, or for a similar reason is thrown out upon a beach, and is partly lost or damaged, either in this process, or whilst being carried ashore in the lighters, such loss or damage, being the effect of an exposure to extraordinary risk for the common safety, is allowable as general average.

Ought the same rule to be applied, when goods are damaged

by being discharged at a port of refuge in the manner customary at that port?

With most kinds of goods, there seems to be no reason why such a discharge should necessarily cause damage; otherwise, all cargoes destined for the port in question, would necessarily arrive damaged, which it would be absurd to suppose. If, then, damage takes place, it must be through some accident or carelessness.

There are, however, some kinds of goods which require a peculiar mode of handling or treatment in discharging, such as can only be given at ports where the importation of such goods is customary. This is the case, for example, with salted hides. The discharge of such goods at a port where the proper treatment is not practised, necessarily involves the damaging of them.

This, however, is an exceptional case, and, in our opinion, it is expedient, though certainly a hardship on the owner of it, that this special risk, arising from a peculiar tenderness of the article itself, should fall on the proprietor of it, and not be brought into contribution.

On the whole, therefore, this committee recommend for adoption the Glasgow resolution of this head, viz. :—

“That the damage done to cargo, and the loss of it and of the freight in it, resulting from discharging it at a port of refuge in the way usual at that port with ships not in distress, ought not to be allowed in general average.”

14. *Damage to cargo in extinguishing a fire.*—On this head they concur with the Glasgow resolution, viz. :—

“That the damage done to ship, cargo, and freight in extinguishing a fire, ought to be allowed in general average.”

In estimating the damage done to cargo by water poured down to put out a fire, it would be proper to exclude such packages as were actually ignited when the water reached them.

15. *Loss on cargo by being sold to raise funds.*—In some

countries such a loss is allowed as general average. The committee consider that it should be treated like a bottomry premium, *i.e.*, should be apportioned over the expenses to defray which the cargo was sold.

The profit, if any, belongs to the proprietor of the goods sold, for the proceeds remain at all times his property.

*B.—Sacrifices of Ship's Materials.*

16. *Cutting away of wreck.*—When a ship's mast has been carried away, and the wreck is afterwards cut away because it endangers the ship and cargo, they are of opinion that the loss by cutting away ought not to be made good by contribution.

Some hold that this is correct on principle; on the ground that the wreck, under such circumstances, is to be regarded as the cause of danger, and, being as it were an intruder, may be got rid of without compensation.

Others, who dissent from this view of the principle, (arguing that the intrusion was involuntary and innocent, and that we should look to the state of facts at the moment of making the sacrifice, and not to any antecedent circumstances,) still concur in holding that such claims should be rejected, on account of the practical difficulty of setting a value upon articles in such a position.

17. *Damage by scuttling a ship to put out a fire.*—The committee are of opinion that all damage which necessarily follows such an act ought to be made good as general average.

It has been suggested that, on account of the difficulty of defining the extent of such damage, it would be well to limit the allowance to the mere repairing of the scuttle-holes, or other damage actually done in the act of cutting them. They are opposed to this limitation.

If a ship, when thus scuttled, subsequently suffers damage in a gale, this further damage ought not, they think, to be made good by contribution, although such damage might not

have taken place had the ship not been on the ground. For, of that damage, the gale is the direct cause, the scuttling only the remote occasion.

All damage, however, which is the result of ordinary weather acting upon the ship at any time whilst she is unavoidably aground after being thus scuttled, should be brought into general average.

18. *Damage by intentional stranding.*—If a ship is intentionally run ashore, to avoid capture or sinking, they think that, as a matter of pure principle, the damage caused by the running ashore ought to be allowed as general average.

When the running ashore is to avoid capture, they see no reason why this principle should not be carried out in practice. The extent of damage allowable should be determined on the principles laid down above for the case of scuttling a ship that is on fire.

When, however, the running ashore is to avoid sinking or stranding elsewhere, some are opposed to the allowance of such damage, on the following grounds:—They think that great abuses would be likely to result from such allowance. In the great majority of cases, intentional stranding means only putting the ship ashore in one place instead of another. This measure ought to be, and usually is, only resorted to when the situation of the ship is desperate. When that is so, the ship herself is really benefited by the act, so that it is scarcely accurate to say that there is a sacrifice of anything. There must frequently be extreme difficulty of determining what portion of the damage suffered by the ship, which in most cases was already leaky, is properly attributable to the stranding. Others do not think that these reasons are sufficient to justify a departure from correct principles.

If any plan could be suggested by which the admission of such claims could be guarded against abuse in practice, whether by limiting it to certain clearly defined exceptional cases, or by any other practical limitations, the committee would gladly take such a plan into consideration.

Two such plans have been suggested, neither of which appears to them satisfactory.

One plan is that laid down in the Glasgow resolution, and re-adopted in the "Projet de Code" brought forward by Messrs. Engels and Van Peborgh, viz.:—

"That, as a general rule, in the case of the (intentional) stranding of a vessel in the course of her voyage, the loss or damage to ship, cargo, or freight, ought not to be the subject of general average; but without prejudice to such a claim in exceptional cases upon clear proof of special facts."

The objection to this rule is, its extreme vagueness. What is an "exceptional case," and what are "special facts," are not defined. Unless this is done, it may be feared that an "exceptional case" will in practice come to mean, a case in which the ship is not insured. But, the moment one attempts to define either of these expressions, the extreme difficulty of framing distinctions which can be worked in practice comes into view. The Glasgow resolution therefore really settles nothing.

The other plan is that laid down in the new German Code, viz.:—

"When the ship has been purposely run ashore, but only if prevention of sinking or capture was thereby intended, the damages caused by the stranding belong to general average." But, "an average distribution is not made if the ship which has been stranded to avoid sinking is not got off, or after being got off is found incapable of repair."

The objection to this is theoretical. Whether the act of running the ship ashore is or is not a general average act, ought to be determined upon the facts existing at the time of running her ashore, not upon subsequent contingencies. According to the German rule, if a ship is slightly damaged by running her ashore, the loss is made good; but if a more

serious damage is done by the same cause, nothing is made good.

If it be determined that damage by intentional stranding shall be brought into general average, the committee suggest, as a practical limitation, that whenever a ship is run ashore because she is leaky, the entire cost of stripping, caulking, and resheathing, when this is done, shall be excluded from general average; on the assumption that, if the ship was leaky enough to justify the running ashore, these repairs would have been requisite in any case.

19. *Damage by carrying a press of sail.*—The act of carrying a press of sail, when this is requisite, whether to avoid imminent danger or no, should, they think, be held to be part of the ordinary handling of the vessel; and the damage thence resulting should not be made good by contribution.

#### SECT. V.—EXTRAORDINARY EXPENSES.

20. *Port of refuge expenses.*—When a ship, being in danger of total loss, owing to sea-damage, deaths or sickness of the crew, or want of provisions or water, is taken into a port of refuge, the act of bearing up for such port is a general average act; and this is so, whether the remote occasion of the ship's disabled state have been a sacrifice or an accident.

This follows from the rule as to consequences laid down in Art. 6. The putting into port does not follow from the disabled state of the ship "by direct physical necessity, independently of any subsequent act of volition."

There is a difference of opinion as to how far the consequences of the act of bearing up for the port of refuge should be made good by contribution.

This difference results from the difference of opinion, pointed out in Art. 7, as to what is the real motive for a general average act.

Those who hold that a general average act must be an act done for "the common safety," hold also that the act of bearing

up for a port of refuge is only a general average act in so far as it is done with the motive of placing the ship and cargo in safety; that "safety" means physical safety, or that state the alternative of which is a total loss; and that, when that state has been reached, the motive of that which is properly the general average act, has been completely attained; consequently that whatever is done subsequently must be done from some other motive.

Applying therefore the rule as to consequences which is laid down in Art. 6, they hold that the act of coming out of the port of refuge, and the expenses consequent on doing so, do not follow from the act of going into that port "by direct physical necessity, independently of any subsequent act of volition." In other words, the coming out of port is connected with the going in very much in the same way as the going in was connected with the previous accident; and if we are to have the same rule for tracing the consequences of accidents, and the consequences of acts of volition, then, since the going into port is held to be no part of the accident, the coming out again should be held to be no part of the going in.

Those who take the opposite view draw a distinction between the case in which the carriage of the cargo in the original ship ceases at the port of refuge, either because the ship is incapacitated from carrying the cargo farther, or because the cargo is unfit to be carried, and the case in which the joint adventure is continued. In the former case, they hold that the general average terminates so soon as the ship and cargo are separated from one another; but, in the latter case, that it continues until the vessel is again set upon her voyage.

The argument in support of this view is as follows:—The ship and cargo being bound together by the contract of affreightment, so that, if at any point short of the place of destination the ship is able to carry on the goods and the goods are fit to be carried, the shipowner cannot withdraw his ship nor the cargo-owner his cargo, it follows that at that point neither ship nor cargo are of any pecuniary value to its owner; and the only

legitimate way by which either can be restored to a state of pecuniary value is, by prosecuting the voyage. Consequently, on this view, the expense of reloading the cargo, and the outward port charges, are expenses incurred for the common benefit of the ship, freight, and cargo.

21. *Wages and provisions of the crew.*—When there is a general average from putting into a port of refuge, ought the wages and provisions of the crew, during the ship's detention, to be allowed as general average?

This item forms one out of a class of losses, incidental more or less directly to the putting into port, none of which are in this country, and none of which, except the item now in question, are in any country brought into general average. These are, the loss of the use of the ship during that detention, her wear and tear whilst detained, the loss of interest on the sale of the cargo from the prolongation of the voyage, and, in many cases, the loss of the season or of the market resulting to the cargo-owner from the same cause. All these are pecuniary losses; and all, with the exception perhaps of the last-named, are as directly and necessarily incurred in consequence of the detention in port as is the cost of maintaining and paying the crew.

On principle, therefore, it would seem that either none, or all, of these incidental expenses ought to be brought into general average. The item of loss of market may be more questionable: still, in the case of a cargo destined for a particular season—*e.g.* fish going to a Spanish port to arrive during Lent—the loss of market resulting from detention is as much a matter of certainty as any other of the items specified.

Some are of opinion that all these losses should be excluded from general average, as being merely incidental to, and not the direct effects of, the act of putting into the port of refuge.

Others dissent from this view on practical grounds; holding as an undeniable fact, that very often, where the wages and



provisions of the crew are not *bond fide* admitted, attempts, and in most cases only too successful, are made to bring these items into the account, under the denomination of labourage, &c.

#### SECT. VI.—THE CONTRIBUTION.

On this head there are only two questions which the committee think it necessary to consider in this report:—

22. *Contributing values.*—Ought contribution to be made upon the values ultimately saved; or ought it, in the case of expenditure, to be made upon the values as existing at the place where the expenditure was incurred?

Jettisons, and all sacrifices which are not replaced until the termination of the adventure, ought to be contributed for upon the ultimate values; that is, upon the values at the place at which the shipowner parts with the cargo. Ought the same rule to apply where there has been an outlay of money at a port of refuge?

In favour of taking the values on the spot, it is argued that:—

Whoever makes the outlay in question, does so as agent for all. The object of making it is to bring the property into safety, and that object has been attained. Consequently, the liability of each contributor really attaches at the moment when the payment is made. If the general average is not collected immediately, the delay is merely for practical convenience, and should not affect the results. But, if the parties are once liable, no subsequent event can take away or increase that liability. If the whole property is subsequently lost, the entire expenses ought not to be thrown on the person who may happen to have advanced the money in the first instance. If some of the property be subsequently damaged, that fact ought not to affect the proportion in which each contributes.

The value, at a port of refuge, of cargo which is destined for another place, should be, not its selling value on the spot, but its value at its port of destination, supposing no accident

on the way, but with a deduction for the expense and risk of conveying it thither.

On the other side it is argued that—

As a matter of theory:—The expense at the intermediate port is incurred with the motive of enabling the ship and cargo to reach their common destination. It is for the sake of this ultimate result that the expenses are incurred. This result, therefore, should in all cases be the basis of contribution. The liability to contribute cannot, if this be so, attach immediately on the incurring of the expense, because it cannot at that period be determined who are the parties really liable, that is, in what proportion each derives a share of that ultimate benefit, for the sake of which the expense was incurred.

As a practical question:—The rule of basing contributions on ultimate values is the more likely to work well. It would be difficult or impracticable in any event to recover a contribution to general average exceeding the value of the property ultimately saved. When goods arrive sea-damaged, it would in some cases be difficult to determine what portion of the deterioration has occurred subsequently to the sailing from the port of refuge.

The force of the practical argument is not denied; but it would be well if the theoretical question could be determined.

This question depends on that raised above, whether the true motive for a general average act is to obtain physical safety, or the completion of the adventure.

23. *Deductions from freight.*—What deductions ought to be made from the contributing value of the freight?

Theoretically, the committee think the deductions ought to be that portion of the crew's wages and of the port charges, the liability for which is contingent upon the earning of the freight. Consequently, advance wages, and port charges at the landing port, ought not to be deducted.

For practical convenience, some are in favour of deducting a uniform proportion of the freight, as representing these expenses.

On the whole, the committee do not think the practical difficulty sufficiently great to justify a departure from correct principle.

By order of the committee,

RICHARD LOWNDES, *Secretary.*

*International General Average Committee,  
15, Fenchurch Buildings, Fenchurch Street, London, E.C.  
October 10th, 1862.*

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#### ART. IV.—THE OFFICE OF LORD-LIEUTENANT AND HIS DEPUTIES.

SOME two years since, Lord Lyttelton, the Lord Lieutenant of Worcestershire, being desirous of obtaining exact information as to the history of the office, and the duties of himself and his deputies, addressed a letter of inquiry on the subject to Mr. John Harward, clerk to the Lieutenancy of the county. Mr. Harward's reply, which was delayed by the difficulty experienced in obtaining the requisite information, has been communicated by his Lordship to the LAW MAGAZINE, and we have much pleasure in laying it before our readers as a minute and, we believe, trustworthy description of the origin and prerogatives of an ancient county office, passed over by Blackstone and other legal writers with a very cursory notice. We have prefixed to Mr. Harward's letter the communication addressed to him by Lord Lyttelton, as the latter contains the particular questions to which the former furnishes a reply.

LORD LYTTELTON TO MR. HARWARD.

*Hagley, Stourbridge, 29th December, 1860.*

DEAR HARWARD,

You have not yet told me what the Deputy Lieutenants are to do at their annual meetings. It seems to me that they

will sit and stare at each other. I am very much obliged for your promised sketch of the duties of a Deputy Lieutenant; but as you are about it I will ask you to extend somewhat the scope of it and make it include the legal relations of the Lord Lieutenant with his deputies, and indeed the legal position of the Lord Lieutenant now generally. I have always thought that legal position rather singularly indefinite, and that the real importance of the office rests wholly on mere usage and convention for which there is no written authority of any kind to be found in any book or document. For its real importance is—First, in the general pre-eminence which he is allowed, and which many people believe to extend even to his taking ceremonial precedence of the High Sheriff (which it certainly does not). Second, in his virtually appointing magistrates.

This, by far the most real part of his power, in fact has, I apprehend, no legal existence or sanction whatever. If anything, he does it, or is allowed and requested to do it, as "*Custos Rotulorum*," which is a distinct office from Lord Lieutenant. The proper duty of said *Custos*, as defined by the title itself, is utterly insignificant. So much for the civil duties. The military functions relating to the militia, yeomanry, and volunteers are of course legal and formal, as he grants the commissions. Now as regards these functions, the natural sense of the Militia Act of 1802 would be that Lords Lieutenant were actually for the first time created by that statute. I apprehend this is certainly not the case: but I should be very glad of any researches you may be able to make which would show clearly the legal origin and history of the name and military functions of the Lord Lieutenant. So about the Deputy Lieutenants. They, I am inclined to think, are really for the first time created by the Militia Act, and their duties and position for the most part expressly specified in that Act. I believe many persons think that they have no other legal functions or obligations but this, apart from mere orders of Secretaries of State, &c., which is clearly erroneous as to the statute law; for the General Volunteer Act, 44

Geo. III., cap. 54, imposes on them many specific duties, and implies a general obligation to see to the execution of the Act. There is, however, a point strictly of legal construction on which I should be glad of your deliberate opinion. By the 3rd section of the Militia Act, the Crown may authorize three Deputy Lieutenants to do all such things as might lawfully be done by the Lord Lieutenant, and a similar power is given to the Lord Lieutenant himself by 46 Geo. III., cap. 90, sec. 45. Now remembering the object of the Militia Act, and that the Volunteer Act in particular was subsequent to it, is this power limited to militia purposes? or does it include all legal functions of the Lord Lieutenant whatever they may be? Also, in the 2nd section of the Militia Act, what is the legal force of the word "their" Deputy Lieutenants? General deference and attention to instructions, &c., is always given by the Deputies to the Lord Lieutenant: but, as in the other matter, common usage and convention has so much to do with it that I should be very glad to know what legal claim there may be to require any such subordination from them. Any information on the general subject, as far as written authority is concerned, which you may happen to meet with I should be very thankful for.

Yours truly,

LYTTELTON.

MR. HARWARD TO LORD LYTTELTON.

MY LORD,

I have at length the honour to submit to your Lordship my Report on the Offices and Duties of Lord Lieutenants and their Deputy Lieutenants. The time I have taken to prepare this Report, will, I fear, seem large indeed compared with the results embodied in it. The subject is, however, beset with difficulties, and it has received more meagre treatment than any other of like importance within my knowledge. A reference to the title, and a mere glance at the probabilities connected with its origin, are all the information afforded by the usual sources of ready information on like questions.

The origin of the office, like all those of ancient date, is involved in some obscurity, but I trace its root in the Anglo-Saxon Ealdorman or Duke. The word itself denotes both civil and military pre-eminence.

The powers and dignity of the Ealdorman doubtless differed in different Saxon races and kingdoms. This indeed was necessarily so from the connexion of this officer with territorial government. In 814 we find that the kingdom of Kent had three of these officers, whilst Mercia had sixteen. The Ealdorman was inseparable from his shire, and as conquest increased or diminished the number of shires comprised in a kingdom, so the number of these officers increased or diminished also. Every freeman in the county was bound to attend the Ealdorman's court and military muster.

The laws of Edgar enact as follows :—" Twice in a year be a shire moot held, and let both the Bishop of the shire and the Ealdorman be present, and there expound both the law of God, and of the world." This shire moot, or folk moot, was viewed with great reverence, and heavy fines were inflicted for any breach of the peace thereat. I may not omit to mention, by way of caution, that in the year 780 the Ealdorman of Northumberland was, by the other officers of the county, burned, because he had been guilty of cruelty and oppression in the exercise of his judicial functions.

In 825, an interesting trial took place at Worcester in the presence of Hama, the woodreeve, who attended for Eadwulf the Ealdorman. The public officers had encroached on certain rights of pasture belonging to Worcester Cathedral, and the Bishop, having given security, attended to make good his claim on oath. Other documents are extant showing that the Ealdorman really stood at the head of the justice of the county, and that he doubtless had the power of holding plea and proceeding to execution both in civil and criminal cases.

That the Ealdorman was the military leader of the county is equally clear ; true it is that he had armed retainers of his own, but he was also the leader of the armed force of the

shire, and often we read of his leading, in Saxon times, the *posse comitatus*, or levy *en masse* of the freemen of the county, to repel invasion, or to exercise the functions of the higher police.

That the Sheriffs were at that time the Ealdorman's subordinate officers both in a civil and military point of view, I cannot doubt.

The Ealdorman's dignity appears to have been supported by grants of lands—which at first passed with the office—a share of fines and voluntary offerings, and, in addition to these, hereditary lands or personal grants from the Crown. In 855, Ealhhan, Bishop of Worcester, and his chapter, gave eleven hides of land to Edelwulf and his duchess, for life, on condition that he would be a good and true friend to the monastery.

The nobility, power, and wealth of the Ealdorman doubtless secured to him a brilliant position. The whole executive government, in fact, was an aristocratical association of the Ealdormen, with the King for President.

The appointment of the Ealdorman was part of the King's prerogative. The office was in general held for life, subject to expulsion for treason and other grave offences; but the appointment seems to have always received, and it indeed probably required, the sanction of the higher nobles, whilst the Ealdorman was installed by the superior shire authorities.

A great change, both in the supreme and local governments of the country, necessarily followed the Norman Conquest. The Ealdorman was, from his power, obnoxious to the new governments; but the same objection did not apply to his subordinate officer, the Sheriff, and hence the extinction for a time of the one office, and the increase in dignity of the other. The Sheriff, too, was popular with the people, who in him recognised at least a remnant of their former institutions.

The creation of the office of Custos Rotulorum, which relates exclusively to civil duties, was in part a return to the civil supremacy of the Ealdorman. This office is noticed much earlier than that of Lord Lieutenant, and it was clearly

in existence prior to the 25th Edward III., inasmuch as the *Custos Rotulorum* of the County Palatine of Lancaster is appointed by the Crown in right of the duchy.

The appointment to this office was originally vested in the Crown, by virtue of its royal prerogative as declared by the 37th Henry VIII., c. 1., and though transferred to the Lord Chancellor by the 3rd Edward VI., c. 1., was restored to the Crown by the 1st William & Mary, c. 21. The *Custos* is a justice of the peace, and by custom, if not by virtue of his appointment, the chief of the justices; for Lambarde, in his *Eirenarcha*, p. 371, says, that among the officers he hath worthily the first place, both for that he was always one of the quorum, for the most part picked out either for wisdom, countenance, or credit. Blackstone, in his *Commentaries*, Book 4, c. 19, s. 7, treats him as the first civil officer in the county.

The creation of the office of Lord Lieutenant was, I believe, in like manner a partial return to the military supremacy of Ealdorman. This office, according to Blackstone, was first created about the reign of Henry VIII., or his children, and superseded the old Commission of Array. Hallam, in his *Middle Ages*, Volume I., page 552, treats it as having been created in the reign of Mary; but this is probably incorrect, as the office of Lieutenant (which is the term generally used in Acts of Parliament) is recognised in the 2nd & 3rd Edward VI., c. 2. In the 3rd & 4th Phil. & Mary, c. 3, the same officer is called Lord Lieutenant. Hallam, too, treats the office as a revival of the ancient local Earldom or Comitatus, but does not cite any authority for it.

The office is treated both by Blackstone and Hallam as a military one; and the statutes above referred to, as well as the 13th Car. II., c. 6, have reference to the military defence of the realm. The latter Act was passed after the Restoration, to recognise the right of the Crown to the sole power and command of the militia; and by the 13th & 14th Car. II., c. 3, s. 2, the Crown is authorised to appoint Lieutenants for the different counties. As Lieutenants had clearly



been previously appointed by the Crown, I am inclined to think that this Act would be considered only as declaratory of the right to appoint Lieutenants, and it was probably passed in order to define and restrict that right; hence Lieutenants appointed under it were appointed only for the purposes of the Act, and the appointment consequently only confers upon them the power and duties defined by the Act itself. That Act was, however, subsequently repealed, and ultimately, by the 42nd Geo. III., c. 90, a similar power was given to the Crown, and under it the present Lord Lieutenants are appointed, and by it, their duties and powers are, I conceive, defined, except so far as further duties or powers are cast upon or given to them by the different subsequent Militia and Volunteer Acts.

Having thus shortly traced the origin of the two offices of *Custos Rotulorum* and Lord Lieutenant, I will endeavour to deal with your Lordship's questions, premising that of late years the two offices have been conferred upon the same person, who in common parlance is termed the Lord Lieutenant only.

I have been unable to find any direct authority for the general pre-eminence which is allowed to the Lord Lieutenant, but I conceive that such pre-eminence is in a great measure attributable to the office strictly so called, as although I find that the *Custos Rotulorum* is treated as first among the justices, (see *Lambarde supra*,) I do not find anything in that office which would be likely to give him general pre-eminence. Your Lordship is, I think, right in treating that pre-eminence as the creature of custom, but it is a custom in all probability based upon tradition of the early importance of the office. It clearly does not now give precedence over the Sheriff, who is treated by Blackstone and others as the first man in the county, and superior in rank to any nobleman therein. (1 Blackstone's Commentaries, p. 343, and Tomlin's Law Dictionary, citing Camden's Brit.) I am not aware of any express authority conferring upon the Lord Lieutenant

the right to appoint, or rather to nominate magistrates for his county. Strictly, all magistrates are appointed by the Crown at the discretion of the Lord Chancellor, (1 Inst. 174, 175,) and I conceive that the power or privilege exercised by the Lord Lieutenant rests merely in custom created as before-mentioned. It must, I think, be attributed, as your Lordship suggests, to the office of Custos Rotulorum, as it is at any rate probable that the power of nominating magistrates would have been delegated to the chief of the justices, as one of the chief civil officers, rather than to the chief military officer in the county, but I am not able to carry this point beyond conjecture. The official duties of the Custos, irrespective of his duties as a magistrate, consist in his appointing the clerk of the peace, and keeping the rolls or records of the peace of the county, as will be seen in Lambarde's Eiren., Book 4, and beyond these I am not aware of any duties incident to the office.

With regard to the existing powers and duties of a Lord Lieutenant, I am not aware of any official powers or duties unconnected with the defence of the realm, and the quelling insurrection, &c., and I conceive that all the powers and duties which he now possesses, or can be called upon to perform, have in a greater or less degree reference to the militia, yeomanry, and volunteers of the county. These powers and duties resolve themselves into two heads; the one consisting of the powers and duties of the Lord Lieutenant without the assistance of any of the Deputy Lieutenants, and the other of his powers and duties as forming the chief member of a meeting of the Lieutenancy.

As to the first of these heads, these powers and duties mainly relate to putting in motion the machinery of the Acts regulating the militia, yeomanry, and volunteers, and to calling them out under the direction of the Crown, either for the defence of the realm, or the quelling of insurrection, &c. The following statement will show what are the principal powers and duties thrown upon the Lord Lieutenant by those Acts.

The Lord Lieutenant has the appointment, subject to the disapprobation of the Crown, of the Deputy Lieutenants (42 Geo. III., c. 90, s. 2), and of the colonels, lieutenant-colonels, majors, and other officers of the militia (s. 2); has the chief command of the militia (s. 5); may, under the directions of the Crown, displace the Deputy Lieutenants and the officers of the militia (s. 17); has the appointment of, and the power of displacing of the clerk of the general meetings of Lieutenancy (s. 18). He, with two Deputy Lieutenants, can call extraordinary general meetings of the Lieutenancy (s. 21); may administer oaths required to be taken in the execution of the Act (s. 67); may act as commander of the militia when there is no other colonel (s. 72); may, with the approbation of the Crown, appoint surgeons to the militia (s. 78); may, on the recommendation of the colonel, appoint quartermasters (s. 79); may appoint additional drummers (s. 85); may join with the colonel or commandant in recommending sergeants, &c., for pensions from Chelsea Hospital (s. 86); may require carriages to be impressed for the militia on march (s. 95); shall embody the militia when directed by the Crown (s. 111 and 141), and shall issue orders accordingly (s. 114); when militia embodied, shall issue orders to the clerks of subdivision meetings to make returns of all persons enrolled (s. 129 and 141); shall issue orders for assembling the men (s. 130 and 141); shall appoint the first subdivision meeting for balloting (s. 132 and 141); shall transmit annually certified returns of the militia to the clerk of the peace (s. 157); shall give certificate to the clerk of the peace in case of deficiency of quotas (s. 158); may appoint, with the approval of the Crown, a Vice-Lieutenant during his absence (46 Geo. III., c. 90, s. 45); with approbation of Secretary of State, shall appoint places for exercises (15 & 16 Vict., c. 50, s. 28); may represent to Quarter Sessions that place provided for militia stores is unfit (17 & 18 Vict., c. 105, s. 2); in conjunction with colonel, may approve of purchase of storehouses (s. 4); when required by one of

the Secretaries of State, may unite portions of militia in two counties to form artillery corps (23 & 24 Vict., c. 94, s. 1); when required by one of the Secretaries of State, shall summon general meetings of the Lieutenancy to alter existing subdivision (23 & 24 Vict., c. 120, s. 1); shall appoint place for holding subdivision meetings (s. 5).

In addition to these powers, the Lord Lieutenant has the appointment of the officers of the yeomanry and volunteers, as the power seems to be recognised by the Volunteer Act of 1804, though not expressly given by it. He may summon volunteers in case of invasion, &c. (44 Geo. III., c. 54, s. 22), and on other occasions in case of riots, &c. (s. 23); may make orders for the assembling of yeomanry and volunteers on receiving orders from the Crown (s. 46), and shall certify the time and place to Secretary at War (s. 48); may submit rules relating thereto to the Crown (s. 56), and communicate approbation to commanding officer.

As to the second of these heads, the powers and duties devolving upon the Lord Lieutenant and Deputy Lieutenants in general meetings of Lieutenancy do not appear to be very extensive, but to consist in further carrying out the machinery of the Militia Acts; and among the principal of such powers and duties may be mentioned the following:—

The general meetings of the Lieutenancy shall consist of the Lord Lieutenant and two Deputy Lieutenants at the least; or on death, absence, &c., of the Lord Lieutenant, of three Deputy Lieutenants, and shall be held once a year; and the Lord Lieutenant and two Deputy Lieutenants, or three Deputy Lieutenants, may summon extraordinary general meetings, and general meetings may be adjourned (42 Geo. III., c. 90, s. 21); shall send notices of time and place of exercise of the militia to subdivision meetings (s. 90); may appoint special constables (46 Geo. III., c. 90, s. 28); may, when the Lord Lieutenant and three Deputy Lieutenants, or in the absence of the Lord Lieutenant, when five Deputy Lieutenants are present, alter, on the requisition or authority

of one of the principal Secretaries of State, the existing subdivisions (23 & 24 Vict., c. 120, s. 1).

Many of the powers which were previously vested in general meetings of the Lieutenancy were taken away by the 23 & 24 Vict., c. 120, which gave powers to the Privy Council and Secretary for War previously exercised by general meetings.

With regard to the Deputy Lieutenants, I think that they derive their powers solely from the Acts of Parliament relating to the militia, volunteers, and yeomanry, though the Deputies of Lieutenants are recognised in Acts prior to those which gave the Lieutenants power to appoint them. They were known long before the Militia Act of 1804, a somewhat similar Act of the 13 & 14 Car. II., c. 3, having given the Lieutenants a similar power to appoint Deputy Lieutenants. In that Act they were required to obey the orders of the Lieutenant; but the clause is not inserted in the 42 Geo. III., c. 90, and their powers being in a great degree independent of the Lord Lieutenant, I do not think that he can exercise any legal control over them, further than in taking proceedings to compel them to execute orders which, by the Militia and Volunteer Acts, he is authorized to issue. By custom and courtesy, he, as the superior officer, is entitled to receive general deference from them; but, beyond what I have referred to, I doubt whether he has any legal control over them, and am not aware of any authority in favour of such power. With regard to the powers and duties of the Deputy Lieutenants, I think that for the present purpose they may be usefully classed under three heads, namely, 1st. Their powers and duties in the absence of or vacancy in the office of Lord Lieutenant. 2ndly. Their powers and duties at the subdivisional meetings; and 3rdly. The powers and duties vested in them, or a certain number of them, out of the subdivisional meetings.

As to the first head, the powers and duties may be considered as, to a great extent, the same as those conferred upon the Lord

Lieutenant, and relate to putting in motion the machinery of the Militia Acts. Among them the following are the principal ones. Three Deputy Lieutenants can grant commissions to officers of militia (42 Geo. III., c. 90, s. 3); can do such acts as the Lord Lieutenant can do (s. 3); shall form a general meeting of the Lieutenancy, and may call extraordinary general meetings (s. 21); may join with the colonels in recommending sergeants for the Chelsea pensions (s. 86); shall embody militia on order from the Crown (s. 111); and issue orders for the purpose (s. 114). In the event of the Crown ordering out the militia, shall cause lists to be made of persons enrolled (s. 129); shall appoint first subdivision meeting for balloting (s. 132); shall muster, train, and exercise the militia pursuant to the order of the Crown (s. 142). Five Deputy Lieutenants may alter the existing subdivisions (23 & 24 Vict., c. 120, s. 1).

In addition to these powers relating to the militia, they may summon the yeomanry and volunteers in case of invasion (44 Geo. III., c. 54, s. 22), or assemble them on their application, with approbation of the Crown (s. 46), and shall certify time and place to Secretary at War (s. 48).

As to the second head, the powers and duties devolving upon subdivisional meetings of the Lieutenancy have more especial reference to enrolling volunteers for the militia and putting in force the provisions for the ballot. They are somewhat numerous; and the Acts point them out very much in detail. They will be found principally to consist of the following:—

Subdivisional meetings shall consist of at least two Deputy Lieutenants, and if two Deputy Lieutenants do not attend, one Deputy Lieutenant and one justice of the peace may act (42 Geo. III., c. 90, s. 22); shall appoint and may displace the clerk to such meetings (s. 18); may add two or more lists together, and determine disagreements between parish officers relative thereto (s. 34); shall accept volunteers specified (s. 42); shall make inquiries as to persons fraudulently bound apprentices, examine persons on oath, and appoint persons so bound to serve in the militia (s. 49); shall cause men to be examined

by a surgeon (s. 52); shall discharge persons chosen by ballot who are unfit, and cause others to be chosen in their place (s. 53); shall cause vacancies on death or promotion to be filled up by ballot (s. 59); on receiving orders from general meeting, shall call out men for exercise (s. 90); shall ballot for men in the place of men who absent themselves and do not return or are not taken within three months (s. 100); shall cause men willing to remain in the militia to be enrolled as volunteers (s. 124); in case of default being made for three months when the whole number enrolled shall have been called out, shall fill vacancies by ballot (s. 128); shall fill up vacancies in case of desertion, &c., by ballot (s. 135); shall accept certain volunteers specified (s. 136); may require their clerks to make out accounts of moneys received and paid by them (s. 139); shall cause vacancies in established militia to be filled up out of supplementary militia in case of their being disembodied (s. 148); shall apportion numbers of men among parishes on receiving numbers appointed to county by the Privy Council (46 Geo. III., c. 90, s. 4); may exempt Quakers from serving on payment of fine (s. 20); may appoint special constables (s. 28); shall transmit list of volunteers to general meetings (15 & 16 Vict., c. 50, s. 17); may require the attendance of a surgeon on application of persons claiming to be exempt by reason of infirmity (17 & 18 Vict., c. 109, s. 32); subdivision meetings shall be held on the first Wednesday in October, in every year, at eleven o'clock (23 & 24 Vict., c. 120, s. 6); shall accept volunteers under section, 42 Geo. III., c. 90 (s. 10); shall direct names of persons exempted from service to be struck out of lists made by overseers, and insert names wrongfully omitted, and shall fix the number of militia men to serve for each parish, and appoint meeting for ballot, and direct overseers to give notice (s. 11); may require the attendance of overseers, &c. (s. 13); shall cause twice the number of men required to be chosen by ballot, and enter their names in a book, and fix another meeting (s. 14); at next meeting shall hear claims of exemp-

tion, and decision shall be final (s. 15); after striking out names of exempted persons, shall cause remaining persons to be examined, sworn, and enrolled, the Secretary for War providing a surgeon for the purpose (s. 16); shall adopt the course previously described in case there are not a sufficient number chosen at the first ballot (s. 17); shall supply vacancies if required by Secretary for War (s. 18); shall accept substitutes (s. 20).

In addition to the above powers and duties relating to the Militia Acts, the subdivision meetings are to deduct the number of yeomanry and volunteers from the number of men liable to the ballot (44 Geo. III., c. 54, s. 16), and enter on a certain list the persons chosen by ballot who are in the yeomanry and volunteers, and give them notice of being so chosen (s. 17); at a meeting where five are present, may reward clerks for trouble caused by the Volunteer Acts (s. 54).

As to the third head, the powers and duties classed under this head relate more especially to minor details, and are given to individual Deputy Lieutenants, so that they may act by themselves without having recourse to the subdivisional meetings, and are chiefly as follows: One may administer oaths to and require the name of volunteers to be enrolled (42 Geo. III., c. 90, s. 44); in case of loss or destruction of lists, any two or more may cause new lists to be made out and returned at next subdivision meeting (s. 46); any two or more may provide substitutes for Quakers (s. 50), and may join with commanding officer in discharging men becoming unfit to serve (s. 55); one may convict substitutes or volunteers who do not appear to be sworn (s. 62); two may order the money agreed to be given to a substitute to be paid to him (s. 63); two or more may apply penalties for refusing to serve or find substitutes in providing substitutes (s. 66); one may administer oaths (s. 67); two Deputy Lieutenants may join with colonel in recommending sergeants for Chelsea pensions (s. 86); one may require carriages to be impressed for militia on march



(s. 95); two may order half the price of volunteers to be paid by the parish officers to persons chosen by ballot who serve or find substitutes, and are not worth £500 (s. 122); three shall submit certified returns of the militia annually to the clerk of the peace (s. 157), and are generally to assist in raising volunteers for the militia (17 & 18 Vict., c. 105, s. 36); one may take declaration as to amount of income with a view to reducing fine for not serving (46 Geo. III., c. 90., s. 17); two may exempt Quakers from serving on payment of fine (s. 20); two, or one and a justice, may exempt persons from serving by reason of bodily infirmity (s. 23); any two or more may issue order for attendance of constables, &c. (23 & 24 Vict., c. 120, s. 13); two or more may imprison persons refusing to be examined as to their fitness for service (s. 22).

The foregoing appear to me to be the chief powers and duties of the Lord Lieutenant and the Deputy Lieutenants of a county, as more especially pointed out by the different Acts of Parliament relating to the militia, yeomanry, and volunteers; but I conceive that they are all bound to assist in the general carrying out of the spirit of those Acts, though it is impossible to lay down any particular rules for their guidance without having my attention directed to some particular point. With regard to the point alluded to in the commencement of your Lordship's letter, it will be borne in mind that at present the militia ballot is suspended, so that there are not likely to be many subjects for any general meeting to take into consideration, even supposing that such meeting is authorized to be held, which, looking at the frame of the 27th section of the 23 & 24 Vict., c. 120, may admit of doubt, as that section enacts that all general meetings relating to the militia shall be suspended. In ordinary cases, when the Militia Acts are put in force, the duties cast upon the general meetings by the Acts will furnish occupation for the members assembled; and in addition to those duties, I conceive that at such meetings there may be general topics relating to the carrying out

of the Militia Acts, which may be usefully discussed; that such discussions may result in action by the meeting, so far as the Acts of Parliament authorize the same, or they may be communicated to the Government, as the resolution of any other meeting, for their consideration. At the present time, I should be disposed very much to concur with your Lordship, that the members assembled at a General Meeting of the Lieutenancy will have little more to do than your Lordship suggests.

It remains for me to deal with the legal questions propounded by your Lordship. With regard to the meaning of the word "their" Deputy Lieutenants in the 2nd section of the 44 Geo. III., c. 90, I think that it must be read as referring to the Deputy Lieutenants appointed by the Lord Lieutenant of each particular county; and with regard to the other point, I am inclined to think that the three Deputy Lieutenants appointed by the Crown, and the Vice-Lieutenant appointed by the Lord Lieutenant, can exercise all the legal powers of the Lord Lieutenant; but, as will be seen from what I have before stated, these powers relate almost, if not altogether, exclusively to the militia, yeomanry and volunteers.

The above remarks appear to me to meet, as far as I am able, the points alluded to in the letter of your Lordship; but I should wish it to be understood that I do not consider that I have at all exhausted the subject, as to do so would involve much more time than I have been able to give, and would require almost exclusive attention for some considerable period. I believe that what I have stated will be found to be correct in the main, but looking at the number of Acts relating to the militia, and the frequent repeal or modification by later Acts of prior ones, it may be that some few of the powers and duties mentioned by me in detail have been repealed and modified. In addition to this, I should state that other powers may possibly be conferred upon the Lord Lieutenant and Deputy Lieutenants by other statutes relating to other subjects of which I am not aware, but to ascertain this would involve an

examination of the whole Statute Law, and would take up more time than I could well devote to the subject.

I have the honour to be, my Lord,

Your Lordship's most obedient and humble servant,

*Stourbridge, September, 1 1862.*

J. HARWARD.

THE RIGHT HON. THE LORD LYTTELTON.

ART. V.—EXTRACT FROM LORD BROUGHAM'S  
LETTER TO THE EARL OF RADNOR.

BROUGHAM, *October 15th, 1862.*

**B**UT as to the last session in its legal and law-amending aspect, it really must be allowed to have done more than might have been expected, considering the degree in which all men's minds were absorbed by the cruel, unjust, and unnecessary civil war of the Americans, the distressed condition of Lancashire, the struggles of the Italian Kingdom, not to mention the distraction of our great International Exhibition. Some really useful amendments of the law were effected, of no great pretensions; for the less unassuming ones are far from being undeniable improvements.

The Parish Assessment Act, without introducing any new principle of assessment, secures a uniform rating throughout unions, and is a considerable step towards a general equality of rating. The opposition which local interests and prejudices successfully made to the Highway Act, causing its rejection no less than fourteen times, is, as Mr. Cox, the able and learned conductor of the *Law Times*, observes, a good proof of its value; and we may expect that, sooner or later, our highways, both parish and county, will be placed on a good footing, so as to give us no longer a reason for envying our neighbours in France their department of *Ponts et Chaussées*. Mr. Cox has given a full and useful analysis of another valuable Act, that for the punishment of Fraudulent Marks on merchan-

dize, an offence by which our commercial character has suffered exceedingly.

Of the amendments having greater pretensions there are two of importance, but having grave defects, which materially detract from their merits. The Lunacy Act, wisely giving in cases of importance the aid of a Judge having more authority than the Commissioner, arose from the Windham Case; and though the Commons rejected an absurd provision excluding medical evidence, the restriction of the inquiry to two years remains, and is highly exceptionable. The Joint Stock Company Consolidation Act, though a great improvement, has two defects of a serious kind. There is no specification of what constitutes membership of a company, a want likely to encourage endless litigation; and the command to publish yearly balance-sheets is confined to banks and insurance companies, instead of extending, as it clearly should, to all.

But the Act of by far the greatest pretension, for facilitating the transfer of real estate, is by many experienced persons expected to prove a failure. Certainly, such a bill should have been subjected to the fullest discussion, both of professional men, through whose instrumentality it must be worked, and of the community at large, for whose dealings it is intended. There could have been no harm whatever in a year's delay, for letting the plan be considered during the long vacation, and no use in hurrying such a measure through Parliament at the end of the session. The great Incorporated Law Society urged strong objections to it, alleging that it was permissive, and no one with a good title would take advantage of it, and holding that it would be inoperative except in creating offices with large salaries. I am very far from concurring in all the objections made, and still less in the sarcasm which has been ventilated, that the bill was hurried through in order to provide a set-off to the Bankruptcy Act, which has proved a total failure. This failure is fully admitted, and by all; but I consider the attempt to improve our conveyancing as conscientiously made, and heartily wish it may succeed, though I have stated

now, as I did at the Social Science Congress, the objections to its hasty enactment, and my preference for the plan repeatedly presented in the shape of bills, extending to estate of every kind the procedure with customary property, by which, as Mr. Fawcett has explained from his large experience in customary courts, the cost of conveyance of the largest estate does not exceed a few shillings, and the dispute of a title is almost unknown.

But all the defects in late measures, and the great occasion for legislation upon other matters, as well as for arrangements in our judicial procedure requiring no new law, though imperatively required, lead to the absolute necessity of a department for performing the duties of Minister of Justice. Such a department would have prevented the omissions and bad provisions in the recent Acts, and would secure the proposal of measures required, beside the inestimable benefit of presiding over the preparation of all bills, with the consent of the Government and of individual members. We are indebted to Mr. Napier, the able and excellent ex-Chancellor of Ireland, for his persevering efforts on this subject in different sessions as long as he continued in Parliament. In 1853 and 1855 he met with little support; but in 1856 he obtained the consent of the Commons to a modified resolution. The year after his triumph was complete. He carried, all but unanimously, an address for the establishment of a separate and responsible department of Public Justice, supported strongly by Lord Palmerston and Lord John Russell, who recommended the Queen to return an immediate answer that the "subject should receive that attentive consideration which its importance demands." I therefore naturally, before the end of the session, called for information as to what had been done in the five years since the "attentive consideration" had been promised; and a private communication from a leading member of the Government apprises me that nothing whatever has been concluded. It may, however, be hoped that this important step, so strongly recommended by the Commons and by the two chief Ministers, will at length

be taken; and there is assuredly no lack of duties for the department. Nevertheless, even if the establishment of it should be delayed, some of these duties are so urgent that they must be discharged without such help.

One of the most pressing requires no legislative interposition. Experience, but especially of late, has shown clearly that the circuits of the judges must be newly cast. Some, as the Norfolk, and perhaps the Midland, are too small. Compared with the Northern, or even the Oxford and the Western, the disproportion is enormous. The division of the Northern is absolutely necessary, and may be effected without increasing the number of the judges, by uniting Yorkshire with the Midland. Lancashire and the four northern counties would be quite a sufficient circuit. A single judge would be sufficient for the Norfolk, unless part of the Home Circuit were thrown into it.

There are great objections to altering the ancient division of the kingdom into counties; but the Recorder of Birmingham, our learned, able and excellent friend, Mr. Hill, when he set forth the hardship of prisoners being sent from a great distance, suggested that they might be committed for trial at the nearest assize town, this optional power being given to the committing magistrate. This would require an Act.

You have lately seen a scandal in Scotland; the agitation over great part of the country on the subject of a conviction for murder. Petitions for pardon, numerous, signed, are sent up, and a meeting was held at Glasgow, attended by thousands, to pass resolutions in favour of such an application nominally, but really against the learned judge and respectable jury who tried the indictment. The Home Secretary, in whose department the consideration of such a petition is, happens to be a lawyer; but this is a mere and a rare accident. His two predecessors were not; and I do not recollect an instance of a lawyer in practice holding that office. Ought not this and all such cases to be brought before the Department of Justice? But this case, and the scandal of the agitation

upon it, in all probability never would have arisen had the attempt I so often made succeeded, to extend my Evidence Act to defendants in criminal cases, on their desiring to be examined, and of course subjected to the sifting of cross-examination. It is plain that the woman convicted would have desired to be examined, and her sifted testimony would either have led to an acquittal or confirmed the verdict; in either case the public mind would have been satisfied. The only objection ever urged to this extension of the Evidence Act is, that any party declining to take the benefit of the law would be supposed to be guilty for that reason. But surely the judge could explain to the jury how consistent such a refusal is with innocence, arising, as it oftentimes would, from the party's want of confidence in his own presence of mind to stand a cross-examination. We must recollect, too, that the existing law allows the examination of defendants compulsorily and without any option in quasi criminal cases, as actions for assault of the worst description, or false imprisonment, or for libel. Lord Denman and Lord Campbell were so much struck with this inconsistency, that they inclined strongly to support my bill, if confined to cases of misdemeanour in which the opposite party was examined for the prosecution.

The want of a Public Prosecutor has been often complained of, and in addition to all the instances of this defect given in my friend Mr. Phillimore's Committee, recent cases have put our inferiority to Scotland in this respect in a very remarkable light. A swindler, for example, having, beside obtaining money on false pretences, committed several forgeries, was not tried for the felony but only for the misdemeanour, which he confessed. His connexions were in good circumstances, and it was urged for him that it was a first offence, and that he was only twenty-three years of age. No Public Prosecutor would have resorted to such plea to excuse his breach of duty. Some years ago I recollect an anchorsmith of good property forging to a large amount, and he found means to pay the recognizances of the party bound over to prosecute, and so escaped.

There are other things which we may very wisely borrow from Scotch procedure. Where the jurisprudence of two countries differs in fundamental principle there can be no mutual interchange. Thus the law regulating the title and conveyance of real estates in France, Scotland, and England, is so entirely different, that the one country cannot borrow from the other. But in procedure it is quite otherwise, and each might greatly profit by the imitation of the others. France, for example, in much that relates to criminal procedure might most advantageously borrow from us, as we might from their criminal appeal system. So Scotland has borrowed our trial by jury in civil cases with great advantage; and we have adopted, from the Scotch, the important principle of local jurisdiction, though as yet very imperfectly. The allowing trustees remuneration is another superiority of their procedure, and ought clearly to be adopted in England in all cases where the constitution of the trust does not expressly preclude it; but with the remuneration should be coupled more stringent obligations, such as the requiring yearly accounts. It is certain that the interests of parties under trust suffer much more constantly from the negligence and even inaction of trustees than from their dishonesty.

I have mentioned the great subject of local judicature, and the vast improvement of our judicial system by the County courts. It is with the most unqualified satisfaction that I observe their success. Last year there were nearly half a million of causes tried by those courts and only seventeen appeals; but the number of actions brought was nearly 900,000, for £2,220,000, so that half of them were settled without going to trial. It is difficult to over-estimate the benefits of such a system to the community, and especially to the working classes. That the jurisdiction of the courts ought to be considerably enlarged, seems evident. In Scotland the local judge has nearly unlimited jurisdiction; and one among other benefits derived from hence, is the facilities thus afforded for the choice of judges in the higher tribunals. It is well



known how often a great advocate proves an indifferent judge. But if the option were given to parties to select the county court for trying their cause, a test of judicial capacity would manifestly be afforded by the comparative resort to the courts. All my attempts to extend the jurisdiction and to make the optional clause operative, failed. But my disappointment was far greater in the rejection of my proposal, often made, of introducing the process of Reconcilement, on which I have more than once addressed you. Can any one doubt the effect of both parties going before an experienced and impartial person, clothed with judicial dignity, and stating their several cases for his advice without the interposition of professional men? It must lead to the abandonment of most of the groundless claims and desperate defences, and the settlement of more than half the actions now brought. And such is the result of the plan wherever, as in Denmark, it has been fairly tried. The whole community, but most of all the humbler classes, have an immediate interest in this improvement, which will save them from being sacrificed to the profit, not of the more respectable branches, but the worst of the legal profession, the harpies who deform and defile it. As often as this has been propounded, it has been met by technical objections, but not one whit more strenuously than my original proposal of County Courts, or the great Evidence Act, the judges themselves joining in the opposition; and yet thirty years have sufficed to refute the one set of objectors, and a much shorter period to convince and convert the others; so that the learned judges have candidly confessed how great a help is afforded to the discovery of the truth by hearing the parties themselves as well as their counsel. Not one of the objections to Reconcilement is more strongly urged, or more plausible in itself, than those I had to encounter on County Courts and the Evidence of Parties.

But now, my dear friend, we are dwelling upon the improvement of the law and the great benefits which the community derives from it. We have both of us, from the

very beginning of the century, anxiously devoted ourselves to protect the rights of the people and promote their improvement, without the least regard to the combinations or the movements of party; and, Heaven be praised! we have had success enough to cheer us. Even at the present hour we are comforted by the spectacle of those who suffer the most severely, conducting themselves with exemplary patience, and perfect abstinence from all outbreaks, and even all discontents; so unlike the working classes of forty years ago under far less pressure. This is manifestly the result of their advance in knowledge, and better comprehension of the causes of the distress. But while our prospects at home are thus comfortable, abroad, in most quarters, the aspect of affairs is truly painful. Mischief is brewing in one part of Germany that may endanger its internal tranquillity, and even shake the general peace; while priestly intrigue in France may have the same sad result, by the maltreatment of Italy. A gloom is thus cast over the prospect of the future in Europe; but in America the view of the present is as distressing as possible. Of the grievous civil war now raging for above twelve months, with the utter disregard of human life and of public credit, it is difficult to speak so as not to offend either, nay, perhaps both parties, of whom one seems bent upon an impossibility. But at least let us hope that the imputation is groundless which would represent the Northern States as prepared to inflict upon their adversaries, and upon humanity itself, the only aggravation whereof the deplorable contest is capable, by exciting an insurrection of the slaves. Such a calamity is more to be dreaded by the friends of that unhappy race than by those of their masters, for the chief sufferings would be theirs; and we might, on their behalf, have to address the more numerous and better armed body of the whites, and to exclaim,

*Tuque prior, tu parce, genus qui ducis Olympo :  
Projice tela manu, sanguis meus !—*

Nor let it be imagined that when the war shall happily cease, its

evils will be at an end, either for the Americans themselves or for others. Armed men in hundreds of thousands will remain, inured to slaughter, incapable of subordination, impatient of peace—their own government will be less secure than ever and all colonies will have a bad neighbour.\*

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#### ART. VI.—THE GLASGOW MURDER.†

**A**FTER nineteen minutes' deliberation, fifteen men, composing a Glasgow jury, returned a unanimous verdict, finding Mrs. Jessie McIntosh, or Maclachlan, guilty of the murder of Jessie McPherson, in the house No. 17, Sandyford Place, Glasgow, on the evening of Friday, the 4th, or the morning of Saturday, the 5th of July, 1862. Lord Deas, in passing sentence of death, intimated his decided concurrence in the verdict, and complimented the jury as being "as intelligent as any he had ever seen in a box." The foreman of the jury thanked Lord Deas for "the comfortable manner in which they had been accommodated," with which he had nothing whatever to do, and then the judge and the fifteen jurymen separated to sleep. They were very unanimous—most wonderfully unanimous for Scotchmen, who cannot readily be

\* I observe that much attention has of late been bestowed upon the subject of Colonial possessions, and great pains have been taken to discuss their drawbacks and advantages. Sixty years ago I fully explained their great benefits in a work upon the subject. It was much esteemed by our friend Windham, notwithstanding what he called its heresies on the Slave Trade, upon which he always had the most unfortunate prejudices. As the book has been long out of print, and I have always refused to publish another edition, I rather think I must have an abridgment prepared of the chapters which set forth the importance in every view of Colonies to the Mother Country, showing the relation in which they stand to her, and exposing the various errors of those who undervalue them.

† Full reports of the trial were published in the *Scotsman*, *Glasgow Herald*, *Courant*, and other leading Scotch newspapers. There is a separate report in a pamphlet form, published by J. H. Hastings, Glasgow, which seems tolerably good, except that it contains fictitious portraits. We have used the *Scotsman* report for the most part as the most trustworthy.

found to agree to the number of fifteen upon any question where it is possible to form two opinions. But from that hour to this there have never come together sixteen men who were of the same unanimous opinion as Lord Deas and his jury. Regarding the guilt or innocence of Mrs. Maclachlan, the intelligent opinion of England, Scotland, and Ireland is in great perplexity, while the less intelligent opinion of Scotland, at least the opinion of the lower orders, is in no perplexity at all, but has, in the proportion of at least twenty to one, settled that Mrs. Maclachlan is innocent, and another person is guilty. Glasgow, as a city, has gone almost insane upon the subject, (it says not a little for the great heart of Glasgow, that a desire to see justice done to a sailor's wife can convulse it so,) and several members of its population have gone altogether insane. Not the mere vulgar students of murder for the sake of the terrific are called upon to attend to a phenomenon like this, a phenomenon which has arisen, as it has done, upon one of the most, if not the most perplexing case of circumstantial evidence known in the annals of crime. We have thought longer than nineteen minutes about it, and have come to some ideas, if not to some conclusions, on the subject, which we shall try to unfold; premising, at the outset, that we feel it very difficult to fix on the best point at which to attack so very complicated a subject, but have chosen to start from an historical narration of facts, appending brief comments as they seem to be required, and then balancing, as we best can, the weightiest matters of evidence.

On the afternoon of Monday, the 7th July, Mr. John Fleming, accountant in Glasgow, on his return from his country-house at Denoon, to which he had gone on Friday, found in his house his father, a very old man, whom he had left in it, and his son, who had entered a few minutes before him, and learned from them that his single domestic servant in this town-house, by name Jessie McPherson, had been missing for three days. His father had been in the house all the time,

cooking his own food, and doing whatever was necessary for himself, and he had made no inquiry whatever about the servant further than to try her bedroom door, which was locked, but had waited for the return of his son, expecting always, as he said, that the servant also would return. His grandson had arrived a little before his son, and as soon as the latter arrived, the young man told his father that the servant "was off, or was lying downstairs dead." They all went to her room door, and Mr. John Fleming, the master of the house, tried the key of the store-room door in the lock, and it opened it. Her dead body was lying on the floor on its face, almost naked, with a cloth thrown over the upper part of it. Doctors were called in, and the police, and it was found that she had died from a number of wounds on the head, caused by a bluntish cutting instrument. There were traces of blood on the kitchen floor, and very visible stains of blood on the back of the door, and the "jaw-box," and a trail along the passage as if the dead body had been drawn from the kitchen to the room. The floor of the kitchen had been washed, or partly washed, apparently at different times, and part of it was not dry when the police and doctors were called in, and was dry two hours afterwards, the floor being of a hard bluish stone which dries quickly. The floor of the room in which the body was locked had been partially washed, as had also the upper part of the body about the head, neck, and breast.

The washing of the floor, and the conduct of old Mr. Fleming in remaining so long in the house by himself without seeking after the servant, at once directed suspicion to him, and on Wednesday he was apprehended in virtue of a warrant from the Sheriff, and committed to prison. The day before his apprehension his son had discovered that various articles of silver plate were missing, and on the same day it was found that they had been pawned by a young woman who gave the name of Mary Macdonald, who received on them the sum of £6 15s. The young man who received the articles had paid little attention to the woman, and could give only an imperfect

description of her. But somehow or other, Mrs. Maclachlan, the intimate friend of the murdered Jessie McPherson, who had been twice examined regarding the murder by the Procurator Fiscal, (the official who collects and reports evidence to the Lord Advocate as Crown-prosecutor,) was at last fixed on, and rightly as it has turned out, as the pledger of the plate, and on Sunday was taken into custody. The clue that guided the police to her has not yet been made public, nor has the date of its discovery, and nothing can be known with certainty regarding it; for the whole investigation was conducted by the Glasgow officials with so little integrity and openness, and so much of the dexterity and cunning of pettifoggery, that it is not at all improbable that Mrs. Maclachlan was suspected almost as early as old Fleming, that she was twice examined by the Procurator Fiscal merely to entrap her, and that she was watched during the week she was at liberty. At all events, she was easily proved to have been wandering about the fields near Hamilton, a small town ten or twelve miles from Glasgow, and to have placed there at various places certain shreds of cloth, which had been saturated with blood, and which were sworn to have been fragments of two petticoats and a gown usually worn by her. She was called upon on three occasions to make what is called in Scotch law a "declaration," which is in theory a voluntary statement by a prisoner charged with a crime, in reference to his or her connexion or want of connexion with that crime; but is in practice a reply to a series of questions put by the Procurator Fiscal in presence of a magistrate to the prisoner, secluded from all advice, for the purpose of entrapping him or her into admissions of complicity or guilt, or into the telling of lies, which are construed to be evidence of guilt, because in Scotland all innocent persons are presumed to speak the truth. Mrs. Maclachlan told lies in her three declarations; perhaps led into a snare, being too simple and polite to hold her tongue when a gentleman like the Procurator Fiscal was pressing her to answer questions. She had told a woman who used to wash for her

that she was going on the night of Friday the 4th July to see Jessie; and her lodger, a Mrs. Campbell, proved that she was out of the house on that night, and that she (Mrs. C.) had to rise to attend to the prisoner's child, who cried at five in the morning; and also that a rum-bottle found in a press in Mr. Fleming's house was like one belonging to her, which it was assumed Mrs. Maclachlan had carried with her. There were three bloody prints of a naked left foot left after the washing of the room floor in which Jessie McPherson's dead body lay. The parts of the board on which they were found were cut out, and the doctors caused Mrs. Maclachlan to dip her naked left foot in blood, when the print of it on a board corresponded with those which had *not* been washed out in Jessie McPherson's bedroom. She had carried off some of Jessie McPherson's clothes with her, and sent them by the railway to Ayr to lie till called for. She had told her husband about this as well as about the pledging of the plate. The ingenious Fiscals had him also apprehended as being guilty of the murder, although they had good reason to believe that he was out of Glasgow on the night in question, and had no reason to believe the contrary, and by this scandalous device they seem to have succeeded in getting him to make a declaration in which he gave them all the information that he had derived from his wife, and then, after they had succeeded in this trick so far as they desired, they liberated him, having professed to find out what they knew, or ought to have known all along, that he was in Ireland on the night of the murder. And so by one means and another, partly fair, partly unfair, the evidence was gathered together which was considered sufficient to demonstrate that Mrs. Maclachlan alone was guilty of the murder of Jessie McPherson, and after eight days' confinement, the old man, Mr. James Fleming, was set at liberty.

The whole evidence, extending into many details, (too numerous to mention,) was fully laid before the public in a trial at the Circuit Court of Glasgow, which occupied four days in September, and the jury, with the approbation of the

presiding judge, Lord Deas, or as many prefer to affirm, at his instigation, after nineteen minutes' deliberation, returned a verdict unanimously finding Mrs. Maclachlan guilty of the murder of Jessie Macpherson, and of the theft of her clothes and of Mr. Fleming's silver plate. After the verdict, and after the Advocate-Depute had "moved for sentence," Mr. Andrew Rutherford Clark, the Sheriff of Inverness, who had acted as counsel for the prisoner, stated that he understood the prisoner had a statement, either to be made by her own lips, or to be read by some one for her. Lord Deas said she was at liberty to make it in any way she preferred; whereupon the prisoner, who had sat quite still during the trial, with her veil down, threw her veil off her pale face for the first time, and in a calm, clear, earnest voice, said, "I desire to have it read, my lord. I am as innocent as my child, who is only three years of age." It was then read to a breathlessly attentive court by Mr. Clark, and when it was finished, the prisoner was ordered to stand up, and Lord Deas proceeded to pronounce sentence of death, in a tone of voice and with a manner which are universally reported to have betrayed no kindness or compassion. He told her that her statement conveyed to his mind "the impression of a tissue of as wicked falsehoods as any to which I ever listened." In spite of not a little respect for Lord Deas, whose rapidity and clearness of intellect, indomitable pugnacity and energy, extensive law learning, and capacity for reaching on fitting occasions a very high level of judicial eloquence, entitle him to a most conspicuous and honourable place among Scotch judges, both living and dead, we cannot but believe that his "impression," so roughly announced to this poor woman standing under the very shadow of the scaffold, is as false as any part of her statement can possibly be: and that in truth this statement contains the most authentic narrative that most probably will ever be given of the mysterious Glasgow tragedy. A tissue of lies it is not, for it fits completely into the whole evidence. There may be *one* very great and very wicked lie in it, but there



is not more than one of that character. The suspicion that has been thrown upon it since the trial is not that it is a tissue of lies, but that it is a tissue of truth with one lie ingeniously interwoven, and that it has been concocted by her agents and adapted to the evidence after they knew it all. That view may possibly be correct, but we do not believe it. We learn on good authority, that her agents are three young lawyers of ability above the average of their profession, of highly respectable connexions, and the prospect of almost certain success in their business of law-agents. They have worked for the poor woman it is said, not a little from motives of charity, for she and her relations are too poor to pay ; and it is all but certain that they would not have risked their chances of success in life, to put the matter no higher, by telling to the world a deliberate lie. They say that the substance of the statement was communicated to them in August, so soon as she was assured of the liberation of Mr. Fleming, regarding whom she had said, oftener than once, that he "would surely clear her," and had expressed her surprise that he did not do it, with the most convincing appearance of sincerity. But whether fabricated by the agents or not, it has given a shape to possibilities which the jury ought to have taken into account, and in the meantime it has obtained a respite from death of the unfortunate woman. Although it may be false in one vast particular, it contains the truest and most concise account of the essence of this case, and our chief regret with regard to it is that we have not space to print it entire. The reading of it occupied forty minutes. It is full of the most Defoe-like circumstantiality of detail ; and if untrue, it is capable of being contradicted at many points.

The substance of this statement is, that on the night in question she called on Jessie McPherson after 10 o'clock, having delayed till that hour to allow the old man Fleming, who was jealous and inquisitive, to be in bed ; that she found on being let in by Jessie that he was in the kitchen beside

her; that a little after eleven he sent her out for half a mutchkin of whisky; that she found the whisky-shop shut, and on returning without the whisky found the back door of the house also shut; that she knocked and received no answer, and knocked again with the lane-door key, and at last old Fleming opened the door; that she found that during her absence Jessie had been struck by him and cut across the forehead and nose, and was lying on the floor of the laundry, which was her bedroom, insensible; that she bathed her face, and washed away the blood, and that in a while Jessie returned to consciousness, and told her that the old man had struck her; that a fortnight before he had come into her bed during the night and attempted to take liberties with her; that she had threatened to tell his son, and that he had begged that she would not, and seemed uneasy at these threats; that she had shut him out of the laundry, and that he came back and in a passion struck her suddenly; that the prisoner nursed her during the night, helped her to bed, and on her feeling cold helped her to the kitchen, as she was weak and unsteady on her feet, and made a kind of bed for her before the fire; that she did not wish a doctor, and did not seem to be apprehensive about her wounds; that about break of day Jessie seemed to turn worse and to faint away; that she proposed to go for a doctor, but the old man seemed averse, and said he did not know where a doctor was to be found, and that he would go down and see how Jessie was, and whether a doctor was necessary; that while she was upstairs trying the front door, and looking out at a back window to see if any one was stirring in the neighbouring houses, she heard a noise downstairs, and on running down, saw the old man finishing the murderous work he had begun; that he alleged as his reason for this second and fatal attack that he knew she could not live, and that if a doctor came he would be brought in for her murder; that she promised not to tell and was induced by him, partly as a bribe, and also in order to produce the appearance that the house had been robbed, to take the articles of silver plate and some

of Jessie McPherson's dresses; that while she was in the house, and some time before she left, the milkboy came to the door, and that the old man went upstairs to answer, and came down without milk; and that she left the house by the back door about eight or half-past eight o'clock, reached her own house about nine o'clock, and was let in by her lodger Mrs. Campbell.

The difficulty of concocting this story in all its details, will strike every intelligent reader, and it will become doubly apparent to any one who will take his pen in hand and try to remodel or abridge it. That it is in all respects a probable or satisfactory statement we cannot say, but the verisimilitude of it is very surprising, as also the manner in which it accounts for much that is mysterious in the case. For instance, what is more remarkable than for the body of a murdered person to be partly washed? But the apparently unexplainable fact becomes intelligible in the light of this statement, and that which could only be the whimsical performance of a lunatic murderer, is seen to be the work of kindness of some one for the time at least not intent on murder. No doubt it is possible that after striking the first rash blow she may have endeavoured to revive her friend, and after she thought recovery hopeless, she may, from that dread of discovery which she imputes to old Fleming, have gone on to murder her. So that if there had been nothing explained by that statement but the washing of the body, the dreadful weight of evidence that presses against her would not have been much lightened. It would have shown that the murder was not deliberate, as was otherwise shown by her announcing the intended call on Jessie that night to the woman whom she desired to come and keep her child. Indeed, had old Fleming not been in the house that night, and had his conduct been less peculiar, and less at variance with his proved character, and all human probability, the verdict of the jury might have been considered as free from reasonable doubt, and as justified by the whole body of the evidence.

But fortunately for Mrs. Maclachlan, it may be unfortunately for the ends of justice, old Fleming's conduct was such as to subject him to very heavy suspicion, and let us say at once that after the best consideration we have been able to give the whole evidence, we are deliberately of opinion that the balance of probabilities hangs about evenly between him and Mrs. Maclachlan; or, in other words, that the proof of his guilt is as strong as the proof of her guilt. The facts that weigh heaviest against her we have already noted, and of them all we think the blackest was the haste with which she pawned the silver plate, and sent the gown of her deceased friend to the dyer. The appropriation of the clothes showed, it must be confessed, no inconsiderable callousness of feeling, and her poverty, from improvidence or other causes, was such as to render the £6 15s. which she received for the silver plate no inconsiderable object to her. But then it must be remembered her poverty was not of a temporary character, but had lasted for years; it was the motive for her crime on the hypothesis of her guilt; and if the £6 15s. worth of silver plate was an adequate motive to commit a murder, it was no less adequate a motive to conceal a murder that had been committed. But if she did commit a murder for the sake of plunder, why did she carry off so little booty? There were surely more than £6 15s. worth of portable valuables in the house of a gentleman in the position of Mr. Fleming the accountant? Was there no more silver plate than that, no jewellery, no bed and table linen equally portable with Jessie McPherson's black silk dress and plaid, and much less likely to be identified, of which Mrs. Maclachlan, who had been a servant in the house, must have had some knowledge? Why carry off these dresses of Jessie McPherson's at all, except that one which was thrown over her own bloody clothes? Does it not almost appear that here the semblance of a robbery had been achieved on the most economical principles, and with results the least favourable to the robber? If plunder was the motive of this murder, why spend time

in washing the floors so long as there was a locked drawer or press in the house to open and ransack?

The old man, who was examined as a witness on the trial of Mrs. Maclachlan, stated that on the morning of Saturday, the 5th of July, he was awakened by a "lood squeel," (*i. e.* a scream,) "an odd kind of squeel," and after that he heard other two not quite so loud; that he jumped out of bed but returned to it as he heard nothing more, took his watch from under his pillow and saw that it was four o'clock of a "verra clear mornin," and that he soon fell asleep and slept till six; that he wondered that Jess did not come as usual to his bed with his porridge and milk at eight o'clock in the morning, and that he lay till nine, when he arose, went down stairs and knocked at the servant's door, but received no answer, and found that it was locked. He admitted that that night he took his shirts that had been washed and dressed off a screen in the kitchen which had been laid or pushed over against the pantry door, and that two of his shirts were marked with blood, but on cross-examination he denied that he knew the marks were blood, but said that he thought they were paint or iron-ore. However, it is to be mentioned in passing, that two of these bloody smears on the shirts were about the size of a hand-breadth, and could not have been mistaken by any one of ordinary intelligence. He further admitted that although he had heard the screams, and found the servant gone and her door locked, he gave no alarm, and never mentioned to any one that the servant was away, but went on making his own bed and cooking his own food during Saturday, Sunday, and Monday, until his son's arrival. Manifestly, the combination of apparent candour and of superhuman carelessness in these statements is very perplexing. He did not require to admit, it would seem at first sight, that he heard screams at four o'clock in the morning, which ought to have helped to incite him to inquire after the servant and have her room door opened at the least, nor is it easy to conjecture how, if Mrs. Maclachlan was the murderess, she should have deferred her

deed of darkness until broad daylight. But her statement does suggest some reason for this admission on the part of the old man, for she says, that it was about that time of the morning that he finished the murder, and that she screamed and called out "help, help." He is, according to his own account, "very deaf," but, if her statement be true, he would hear these screams, and perhaps he might think that some one outside had heard them and that they were so loud that it would not do to deny that he also had heard them. The excuse set up for this three days' apathy on the part of Mr. Fleming senior, is, that he is eighty-seven years of age, that he had been a weaver in his youth and did not require the attendance of a servant, and that Jessie McPherson was not his servant. But, unluckily for this excuse, it was proved that his curiosity was far from torpid; that he had got out of bed to see who rang the door-bell; that he watched all the servants in the most offensive manner, acting as a spy upon their visitors, and asking where they had been and what they had been doing whenever they left the house, and that Jessie McPherson enjoyed a special share of his attentions. In truth, the best and only feasible excuse for his conduct lies there: and it is this, that he may have supposed that Jessie McPherson had left the house to escape his indecent importunities, and was ashamed to mention her absence on that account. Whether he was eighty-seven years of age or not was far from being satisfactorily proved, but it is certain that he did not look nearly so old; also, that he collected the rents of a property, week by week, inhabited by some of the greatest profligates in Glasgow, and had vigour of mind enough for that business; and further, that within the last three years he underwent a rebuke according to the Scotch fashion, before the kirk session, for being the father of an illegitimate child, born to him by a domestic servant. Lord Deas, in his charge, thus disposed of his abnormal curiosity and the epithets applied to him because of it: "The reason for his being an old devil or an old wretch was that he was very inquisitive; nobody could come to see them without

his knowing of it; they could not bring in their friends without his knowing of it. I do not say how far that was proper or not; but you will judge if that does or does not go deep into a man's character in a charge like this. I say you will judge how far that goes to prove that the old man is likely to be a murderer." In this small specimen of his lordship's charge there is recognisable a touch of that most unjudicial special pleading which characterized the whole of it, setting up evidence against the prisoner that was defective, and explaining away whatever was in her favour. The question for the jury was not whether looking curiously after servants "goes to prove that the old man was likely to be a murderer," but whether he would live for three days in the house alone with the servant absent and her door locked, and take no means to discover what had become of her. And if he could so suppress his usually offensive curiosity, for what purpose did he suppress it? Was it because he knew all already? And if he knew all, how and when did he come to know?

A still more damaging circumstance against him than his astonishing, and all but incredible carelessness, was his behaviour towards and concerning the milkboy who came every day with milk. He stated on oath that on Saturday morning, the morning of the murder, he lay in bed until nine o'clock, and at first he denied that that morning he had seen the milkboy at all. But the milkboy proved, and his master who remained with the cart corroborated him, that he called at Mr. Fleming's house between half-past seven and twenty minutes to eight on the morning, and that the old man, for the first time, answered the door at once, and said that no milk was wanted. The old man had sworn that he used to receive his porridge and milk in bed at eight in the morning, that he wondered that Jess did not come, and that he was not out of bed until nine in the morning. How that can be reconciled with the fact that he was up before eight in the morning, that he answered the door at once, and that he said that no milk was needed, and that *never* before that morning

had milk been refused at that door, has not yet been attempted by Lord Deas, or any other who holds that the "old gentleman is free from all suspicion." If Mrs. Maclachlan's agents are to be believed, she had told them of this call of the milkboy early in August, before they had seen or heard of the milkboy; and it does not appear that the public prosecutors were apprised in time of what he could prove, or old Mr. Fleming would have been warned against tumbling into such a frightful pitfall. To the question how she should have known of the call of the milkboy, and that no milk was taken, there is only one credible answer, so far as we can see, and that is that she must have been in the house at the time; and it is very improbable that she remained there, running the risk of detection in the most needless manner, without old Fleming's knowledge. How he should know that the servant required no milk, and be so ready to answer the door for her before his usual hour of rising, and why the regular supply of milk should not be taken into that house only on the three mornings that she lay dead in it, have not yet been explained on the theory of his innocence.

Another fact spoken to by the milkboy is not much less adverse to him. The milkboy heard him take the chain off the door before he opened it. Now he had sworn that the chain was not on the door, and that it was merely on the sneck, and that whoever had gone out had gone out by it. The theory of his innocence which he had to swear to was that the murderer had gone out by the front door, which he found standing on the sneck at nine o'clock in the morning—a theory which does not well agree with his taking off the chain at twenty minutes before eight in the morning. But according to Mrs. Maclachlan's statement his taking off the chain is natural enough, for no one had left the house at this time; so that fact also is confirmatory of her statement, and strongly condemnatory of old Fleming.

There is yet another point of evidence of the same character, and that is the washing of the floor of the kitchen and bedroom.



The floor of the kitchen seemed to have been washed at different times, and when the police surgeon and the police were called in, a part of the kitchen floor was damp, and it was dry two hours afterwards. Who did that washing? Not Mrs. Maclachlan, for no one alleged that she had been there from Saturday morning. If she washed the floor she must have done it all at once. It is therefore as certain as anything proved by circumstantial evidence can be, that she did not wash the floor. Indeed she had no reason to do it, if she went there merely to rob the house, and commit murder if necessary to allow her to rob. A robber who had been under the necessity of committing murder, would hardly stay to wash the floor, but would take what booty he could find and decamp at once. But the theory of the Crown was, that although Mrs. Maclachlan probably heard old Fleming jump out of bed in the room above her, when she was hacking her friend to death in the room below, she stayed to wash the kitchen in order to avert the suspicions of the old man, whom she was supposed to have calculated upon giving no alarm for three days! But has the Crown any theory for the washing of parts of the floor of the bedroom in which the dead body was locked up? No suspicion could be averted by that; for after the bedroom door was opened the murder was disclosed. But on the floor of that bedroom there were three foot-prints left marked in blood. They were quite visible. No attempt had been made to wash them out. They were undoubtedly the foot-prints of the prisoner. If she washed that floor, she did it after four o'clock of a July morning, when it was broad daylight, and when she must have seen these foot-prints. For what better purpose could she have washed the floor than to have washed them out? For what better purpose could old Fleming have washed part of it than to have washed out his own and left Mrs. Maclachlan's there to testify against her should he happen to be suspected? Whether these three bloody foot-prints were left intentionally or not, the washing of the floor was much more like the act of one who was to

remain in the house, than of a thief who was to leave it as fast as possible ; and it is certain that the washing of the floor which had not dried when the police came in, could not have been done by Mrs. Maclachlan. A policeman on the beat swore that he saw two women coming out of the house on Saturday evening between eight and nine, and that the prisoner was not one of them. But Lord Deas disposed of his evidence by asserting that he had mistaken the number of the house. One of the most favourable circumstances for old Fleming, indeed, we may say, the circumstance that has saved him from being in the condemned cell of Mrs. Maclachlan, is, that there was no blood on his clothes ; as it was on the other hand a damning circumstance against her, that there was a great deal of blood upon her clothes ; those shreds of clothes that she had endeavoured to dispose of, by dropping them in the fields about Hamilton. But for her, there is this to be said, that there was a great deal too much blood upon her clothes for simple murder. They were saturated with blood, and that they would not have been although she had hewed Jessie McPherson to pieces. In that case a few spurts of blood, showing themselves in isolated drops, most likely on the upper part of her dress, is all that could have been expected. The saturation of her petticoats is rather confirmatory of her statement, that she came into contact with this blood in nursing and not in wounding her friend. The spots of blood that start out upon a murderer from his victim, seldom go through the outer dress, and they alight on those parts of it that are nearest the limbs that are engaged in wounding. But what are the parts of this woman's clothes that are produced with marks of blood on them ? Not the sleeves and body of her gown. A sleeve of the gown in which she is assumed to have committed the murder is produced without any blood on it—not one spot. The bloody rags that are produced are her petticoats, and as we can gather from the evidence, the flounced skirts of her gown and her crinoline. And the stains of blood are not the spots that bespeak actual murder, but the

saturation that would necessarily happen to nursing, and which might happen to one cleaning away blood. In short, her clothes, if duly considered, prove her innocence rather than her guilt. They prove that her connexion with this deed of blood was an innocent connexion in so far as they prove anything. Much stress is laid upon no clothes of old Fleming being found with blood on them, but it ought to be remembered that he had three days to dispose of his bloody clothes. If Mrs. Maclachlan had not taken the most infatuated way possible to dispose of her clothes, she too might have been in the position of having none with blood on them. Perhaps, however, some of them might have been not accounted for, to her possession of which her lodger and her washerwoman and other acquaintances could swear, as they did to the rags found in the fields. But who can tell that all old Fleming's clothes are accounted for? who knew what clothes he had? Most likely only Jessie McPherson.

If his son knew, it does not seem likely that his son would speak out, and there was nothing to hinder the old man during the three days he was alone, with a full coal-cellar and a large kitchen fire at his disposal, from burning an entire suit of clothes and a great deal besides. Mrs. Maclachlan says she saw him burn his bloody shirt in the kitchen, and after the trial it turns out that a detective found a button among the ashes, and gave it to the Fiscals, but they suppressed that bit of evidence. There is a part of the wood-work of the kitchen missing. Surely Mrs. Maclachlan had no reason to dispose of that, just as little as she had to wash the bedroom floor and the cleaver.

The conduct of old Fleming at the time the body was discovered might have been very important either for him or against him if observed by strangers. But of the impression it made we have only one uncertain glimpse. His son told the doctors and the police that there was a key in the inside of the door of the servant's room, that he pushed it out with the store room key, and that he heard it fall on the floor. He afterwards denied that he had done so and said he must have been

mistaken; but the reverse was clearly proved by the doctors and by the police, one of whom went to look for the key, and told Mr. Fleming that he could not find it. This story of the key in the inside of the door was of course a suggestion that the door had been locked from within, and of suicide. And why should Mr. John Fleming have suggested suicide if he did not suspect his father?

There are many other points too numerous to mention in detail, or to mention at all; such as the multitude of the wounds, there being no less than forty of them; also the character of the wounds. If simple murder to facilitate theft was intended, and the attack had been begun during her sleep in bed, as Lord Deas suggested, why not cut her throat, or kill her at a blow? The police surgeon said that some of the wounds had the appearance of being inflicted after death, but how long he made no attempt to estimate. Must they have been inflicted more than three hours and a half after death and after four o'clock on that July morning? And there are other questions, such as whether Mrs. Maclachlan had time to wash the kitchen, and the room, and the cleaver, and the sheet, and to rifle the house, all in three hours and a half? And whether her remarkable statement corresponds with the appearances the doctors and the police observed in the house, or is inconsistent with them? So far as we can judge from the materials in evidence it is not inconsistent with them, but the reverse.

Regarding the administration of criminal law in some foreign countries, we should hesitate to be censorious, because their barbarism would be their excuse; but Scotland is a country comparatively civilized, and is therefore inexcusable, and we cannot choose but say, that the investigation regarding this murder reflects very little credit upon the practice of criminal law in Scotland. The police alone seem to have done their work respectably and not to have merited public reprobation. But the Procurators Fiscal were too keen and unscrupulous. The public opinion seems to be that they

suppressed evidence that might have been favourable to Mrs. Maclachlan. For example, it is said that they concealed the shirt button found by a detective among the ashes of the kitchen fire, and a bloody hammer found in Jessie McPherson's bedroom. In these particulars they may be misrepresented; but certain it is that they had Mrs. Maclachlan's husband taken into custody as guilty of the murder when they had no reason whatever to believe in his guilt, simply to extract from him, by taking his declaration, whatever information they could which could guide them in collecting evidence against his wife. Lord Deas had no word of reprehension for this infamous obtaining of information upon false pretences; for a false accusation of murder, either known to be false or not believed with some sort of reason to be true, is a false pretence of the most infamous kind; but it will be for the Crown and for the public mind of Scotland to say whether the ends of justice are worth attaining by such dishonourable means, and whether it is worth while to punish crime at all, if in doing so it is necessary to sacrifice honour and morality. The Advocate-Depute, Mr. Gifford, was upon the whole fair and temperate. His speech was disfigured by ludicrous spurts of bombast, but it treated the evidence with considerable impartiality for a Scotch prosecutor, and was vastly more judicial than the charge of Lord Deas. But there is one little trick in Mr. Gifford's conduct of the cause which we think it our duty to expose, and that was gliding over in silence the weak points of his case. Hardly any of those mentioned by us were fairly grappled with by him. The dampness of the kitchen floor, for example, when the doctors and police were first called in, and the fact that it was dry two hours after, showed that it must have been washed on that day, and by some one else than the prisoner. This circumstance was most favourable to her, but neither Mr. Gifford nor Lord Deas said a word about it, apparently thinking it best to be silent regarding what they could not explain in accordance with their own theory of the evidence,

which is a very easy and ingenious way indeed of propping up a theory. We might condemn this sort of thing as uncandid; but we presume it must be agreeable to the taciturn, cautious, and metaphysical character of the Scottish people, or it would not be tolerated in those who are honoured to serve the Crown as counsel, or sit on the bench as judge. According to the exact theological language of the North, this kind of sin is a sin of omission, and a very venial sin it seems to be; for the Advocate Depute, no doubt eminent in his profession, or he would not hold the position he does, had, in a question of life and death, neither the courage nor the candour to admit many of the circumstances favourable to the prisoner as an English counsel for the Crown would have done, but either evaded them or passed them by in silence, considering that sort of conduct to be prudent and discreet. His speech has been greatly more praised in Scotland than that of Mr. Clark, who conducted the defence, and which seems to us superior. Going upon Burke's principle, that "print settles all," which is, indeed, all we have to go upon, we cannot but think the style of Mr. Clark's speech far less objectionable than that of Mr. Gifford. It is not a strong speech, nor does it touch upon some of the strong points of his case; and it is too evidently extempore, and spoken without that careful preparation of passages which Lord Brougham so forcibly recommends to orators. But it was spoken at the close of the third of three long days, when body and brain must have both been almost tired out, and yet the arguments are forcibly put and judiciously disposed, and the style is clear, nervous, lawyer-like, and at least free from school-boy bombast. No doubt he was much hampered by the "statement" of the prisoner. What to do with it he must have had great difficulty in deciding; whether to put it in at the beginning of the trial as a special defence, or to read it as part of his speech, or to reserve it, as was done, against a verdict of condemnation. He has been widely censured for so reserving it, and for not, thereby, putting "the prisoner's case"

to the jury, and thus in a sort of way suppressing the truth. We can see his reason for doing so was the hope that the Crown would fail to prove that she was in the house at Sandyford Place that night, and that the evidence would break down where it broke down in the case of Miss Madeleine Smith—in the want of proof of opportunity to commit the murder. No doubt that hope was frustrated. Had it been otherwise his skill and boldness would have been commended. After the failure of a plan nothing is more natural and easy than to condemn it. We leave that simple work to others, being unable to pronounce an opinion, and say that Mr. Clark, whom Lord Deas spoke of as one “of the ablest counsel at the bar of this country,” did not decide for the best. He was not bound to disclose that she was in the house that night. The prosecution was bound to prove it. The only violation of truth of which a counsel for the prisoner can be guilty is, not the concealment of adverse facts, but the assertion of what he knows to be false, and we have not read aright if Mr. Clark did not exhibit more candour than most others connected with this trial and its antecedents.

The conduct of Lord Deas has been almost universally censured, and we are sorry to be compelled to join in that censure against a British judge, of high talent, and of undoubted zeal in the discharge of what he believes to be his duty. Instead of maintaining a proper judicial equilibrium, and holding the balance of justice even, he put his foot fiercely into one scale, and kicked at the other. We shrink from the tedious and unpleasant task of analysing his charge; we leave it to the judgment of every intelligent professional and non-professional reader. Others may find in it what we have failed to find. It lasted four hours, and from beginning to end of it there is not one observation favourable to the prisoner; not one fair consideration of a doubt in her favour; not one suggestion that any fact renders her guilt a matter of the least doubt. On the contrary, facts that in our humble opinion tell strongly in her favour, are either quietly ignored, or disposed of by reckless assertion

or the most transparent sophistry. A policeman saw two women come out of the house on the Saturday night. He must have mistaken the number of the house. The old man said that the chain was not on the door, and then that it was on. A man often puts the chain on the door, and forgets about it. The milkboy heard the chain taken off the door. It must have been something else he heard. Jessie McPherson some days before her death told a married female friend that she was very unhappy in Fleming's house, that the old man was an old devil, and that she had something to tell her which she could not tell in presence of this friend's husband. This mysterious something which female delicacy would not allow her to talk of in presence of a man was her intention of going to Australia! And after this fashion his Lordship disposes of all evidence favourable to a prisoner tried for her life. No advocate who could be replied to would dare to be so reckless in argument, or rather in assertion, for argument must always commend itself somewhat to the reason of others. We believe that it is common, too common, for some Scotch judges to act the part of "senior counsel for the Crown," and to forget their dignity so far as to beseech juries to return verdicts of guilty on very insufficient evidence. This excessive loyalty seems to be peculiar to the Scotch character. The late Lord Campbell introduced a modified and comparatively inoffensive form of it into England. He used to boast of his success in obtaining convictions, and talked with patronizing complacency of such eminent toxicologists as "Dr. Christison, whose able assistance I had in the trial of Palmer for poisoning." But such undue bias is unbecoming to the bench, unfair to the Crown, and dangerous to the subject, and we hope that the public censure which has fallen upon Lord Deas, who had, and will still have, some reputation to lose, will act as a warning to smaller occupants of the bench who would be more mischievous if they had half his ability.

This remarkable trial, whatever judgment may be finally formed upon its circumstances, seems to us a conclusive



instance of the mischief done by our present rules of criminal evidence. If Lord Brougham should re-introduce his Bill for admitting the voluntary testimony of prisoners, subject to cross-examination, he will find in the trial of Mrs. Maclachlan a formidable argument for his measure. Whether we believe her innocent or guilty, it must be equally the subject of regret that she was not able to tell her own tale to the jury. If innocent, she would have given a straightforward account, and might have boldly challenged Fleming with the murder, with the certainty that cross-examination would have strengthened her case, as it nearly always does that of an honest witness. If guilty, she would probably have betrayed herself, and have removed from the public mind all doubt as to the justice of the verdict. What can be less reasonable than to refuse the testimony of a prisoner when you have the power to test its accuracy, and to accept it at the first moment when it can pass uncontradicted? Is the subsequent private inquiry (when obtained) to be compared, in point of justice or efficiency, with the thorough sifting of every disputed point in open court?

To review and if necessary correct the unanimous verdict of the jury, the Secretary of State has been appealed to by petitions from all the chief towns of Scotland, signed by tens of thousands. He has respited the prisoner until the 1st of November, and has ordered a full investigation into facts. But for this investigation there is no machinery. Sir Archibald Alison, the Sheriff of Lanarkshire, has been presiding as a sort of self-appointed King Log at the examination of witnesses, but what is to be done with their evidence, no man pretends to know. More recently the Lord Advocate Moncrieff has appointed Mr. George Young, Advocate, as a special commissioner to preside over this investigation. To this appointment there can be no objection, for Mr. George Young is at the head of the Scottish Bar, (omitting the Lord Advocate, and the Solicitor-General Maitland,) and the Lord Advocate being a party to this investigation, it will be his duty to support the verdict. But for this he might himself have been

trusted by the public to conduct the investigation. This strange enigma, and the no very suitable means for solving it, taken in connexion with other cases, suggest the question whether there ought not to be in this country a tribunal analogous to the French Court of Cassation, to correct the errors of our criminal courts. There may be prisoners in whose fate the public may not be roused to take an interest, and who may die unjustly, because no popular appeal has been made to the Secretary of State for them. Moreover, an appeal to the Secretary of State is too difficult; as a tribunal of review he is too inaccessible. His modes of obtaining information are irregular, and the information on which he decides is not published. He is, too, overwhelmed with other work, and cannot readily afford time to investigate a matter so mysterious and complicated as that in which the guilt or innocence of Mrs. Maclachlan is involved. Of course we do not suggest the creation of a Scotch Court of Cassation. The Scotch High Court of Justiciary (there being no appeal from it to the House of Lords) is the most inconsistent in its decisions of any court of last resort in the three kingdoms—three judges one Monday deciding one thing, and another three on another Monday deciding the very opposite. If we are to have a Court of Cassation it would require to be a British Court, set high above the provincial prejudices of Edinburgh, Glasgow, and Dublin, and having no less authority, we think, than that of Her Majesty's Privy Council. It is a melancholy reflection, that the consideration of a famous trial may suggest improvements in the law, but can bring little or no help to the evils of the case itself. The mismanagement and unintentional injustice, the imperfect sifting of facts, which have been too characteristic of the Glasgow trial, can no more be recalled than the words in which Lord Deas expounded to the jury his startling philosophical proposition that "circumstances cannot lie." Whether circumstances can lie or not; or whether they have been made to lie and affirm as a fact what is but at most a suspicion, is the question which Sir

George Grey, in default of a more regular tribunal, is called on to decide, and will decide finally, perhaps, while these sheets are passing through the press. What the issue may be we cannot predict. On the day this ineffectual article is given to the world, the poor woman whose mysterious story has been discussed in it, may be sent by the hands of man into another world. Against the rashness of the verdict we are bound to protest after repeated and most anxious deliberation upon all the facts as yet disclosed, and in that deliberation we have been actuated solely by a love of justice and truth. If she were guilty of murder and guilty beyond a doubt, we say that she ought certainly to suffer death if the last penalty of the law is ever to be exacted at all; but we cannot think that she is guilty beyond a doubt; we cannot say that this mystery is unsolved; and we greatly fear, if no new light is thrown upon it, and the sentence of the law is carried out, that this double tragedy may be remembered for many generations, and remembered most vividly as a blunder in the administration of the law, as a stroke struck by the sword of blind vengeance, and struck in the dark.

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#### ART. VII.—THE PATENT LAW.

**I**T is probable that within two or three years we shall see a considerable change in the administration of our law of patents, if not in the actual framework of the law itself. For some time past the subject has been discussed in the House of Commons, in the two great Associations which represent the educated opinion of the country on questions of scientific legislation, and in various other public assemblies; and it is notorious that in all these places, and among the many discordant views that have been propounded, a unanimous verdict of dissatisfaction with the present system has been recorded; indeed, we hardly know any one practically ac-

quainted with the working of the patent law, whether lawyer, manufacturer, man of science, or patent agent, who does not admit grave defects in its present condition, and has not his own device for the remedies. Such a state of things demands inquiry, and the more so as we might otherwise fall into the evil of precipitate and mistaken legislation; and the Government have wisely complied with the expression of feeling in the House of Commons, by issuing a Royal Commission to investigate into the subject and report thereon.\* It may not be inapposite at the present moment to offer a few remarks on some portions of that wide field of inquiry on which the commissioners are about to enter.

Whatever opinion may be entertained on the abstract question of the right of an inventor to property in an invention, the product of his own brain, the general consent of civilised communities has recognised the policy of such rights, and of the enactment of laws to enforce them. Up to a certain point, indeed, the privilege is of natural law; for of all acquired rights, that of an inventor to his own creation may be most truly called his own; so long as he keeps it to himself he possesses that property which the first occupant by common consent of mankind possesses in the subject of his occupancy; he may enjoy it in secret or he may give it when he chooses to the public.

The analogy of property in inventions and in other things is complete up to this stage, but when the inventor or the author has given his invention or his book to the public, the right to restrain others from copying that invention or book, from applying the elements of matter equally within his direction, as of the inventor to the same or similar objects, is matter of positive law and of municipal regulation. In speaking of the rights of inventors, or of patent right, it is desirable

\* The names of the commissioners are as follows:—Lord Stanley; Lord Overstone; Sir William Erle; Sir W. Page Wood; Sir Hugh Cairns, Q.C., M.P.; Horatio Waddington, Esq.; W. R. Grove, Esq., Q.C.; W. M. Hindmarsh, Esq., Q.C.; W. E. Foster, Esq., M.P.; William Fairbairn, Esq., F.R.S.

that the distinction above adverted to should be kept in mind, as disregard of this distinction has led to some confusion on the subject.

For instance, discussions have from time to time arisen on the question whether the grant of a patent for an invention is *debito justitiæ*, or in other words, whether the inventor has a right to demand such grant, or whether it is to be regarded as an act of grace and favour on the part of the Crown to the subject. The latter would appear to be the true view of the case according to the law of the United Kingdom, the power in the Crown in making such grants being limited by the Legislature. It follows from these principles, and is undoubtedly true in theory, that the Crown has a perfect right to refuse any such grant, or to make it on certain or such conditions as it may think fit; and that if those conditions are not complied with, the subject has no just ground of complaint.

The Patent Law Amendment Act, 1854, exhibits this theory in its true light. The applicant for letters patent represents that he has made a certain invention, which to the best of his belief is new and useful, and thereupon he prays for a grant of letters patent for the same. The application is referred to the law officer, as the adviser of the Crown, and the grant is made or not, according to his report; and will be withheld, notwithstanding his report in its favour, should the Lord Chancellor see good reason for refusing to affix the great seal to the grant.

The proceedings above referred to are in the control of the Commissioners of Patents, who have the power of interposing such conditions in the nature of an inquiry by the law officers, or other competent persons, as they may see fit; and it is only fair to the authors of the existing patent law to say, that in their opinion the powers already conferred on the Commissioners by Parliament are sufficient to remedy most of the evils complained of, were those powers exercised with energy and in the right direction. It has been stated by Mr. Thomas Webster, than whom no man is more competent

to pronounce an opinion, that the alterations in the present system recommended by the Committee of the Social Science Association might all have been thus carried out without need of further legislation. This may possibly be too sanguine a view, but it is one worth consideration, and we will therefore proceed to detail what the views of the committee are, and what class of evils they were designed to remedy. We will premise that no body of men could be found whose judgment is likely to carry more weight with the public; it was in reality a joint committee of the British Association for the Advancement of Science, and the Social Science Association; the chairman was Lord Stanley; Mr. Joseph Napier, General Sabine, Mr. Grove, Mr. Webster, Mr. Heywood, and other eminent men, were among its active members; its report was prepared with great care, and was based on resolutions carried after anxious inquiry and discussion. We bear this willing testimony to the worth and labours of the committee, though we are not prepared unreservedly to endorse their recommendations.

These recommendations were shortly as follows:—

That all application for grants of letters patent should be subjected to a preliminary investigation before a special public tribunal, which should have power to decide on the granting of patents, though it should be open to inventors to renew their application notwithstanding previous refusal.

That the tribunal should be formed by a permanent salaried judge, assisted when necessary by the advice of scientific assessors, five in number, to be chosen from a panel nominated by the commissioners, for the adjudication upon facts, when deemed necessary by the judge, or demanded by either of the parties.

That the jurisdiction of the tribunal should extend to the trial of all questions of copyright and registration of design, and be conclusive, subject to the right of appeal to either of the Courts of Exchequer Chamber, with a final appeal to the House of Lords.

That for the preliminary examination the assessors, if the judge require their assistance, should be two in number, named by the commissioners from the existing panel—the decision to rest with the judge. The committee also approved of the principle of compelling patentees to grant licences on terms to be fixed by arbitration, or in case the parties shall not agree to such arbitration, then by the proposed tribunal or by an arbitrator or arbitrators appointed by the tribunal.\*

It will be observed that the recommendations of the committee are directed to the remedy of the three following defects in the existing system:—1. The multiplication of patents; 2. The obstructiveness of patents; 3. The litigation of patents. These are no new complaints; they have been repeated on many occasions for the last twenty years, they were the subject of much consideration by the promoters of the Patent Law Amendment Act, 1852, and the remedies were distinctly pointed out, and to a certain extent provided for; but the precautionary and protective measures contemplated and provided for by the Act, have not been carried out, and this omission has aggravated many of the evils that have so long been the subject of complaint. Let us say a few words on each of the alleged grievances.

1. *The Multiplication of Patents.*—The inventor and the public are equally aggrieved by the indiscriminate issue of patents. The loss to inventors from the grant of patents for inventions which are old or worthless amounts to a very large sum in direct money payment alone, without taking into account the cost to the inventor for time, labour, and experiments. The inventor may be, and frequently is, honestly misled; though the means of information are accessible to those who have long accumulated experience on the subject. Inventors, it should be remembered, are taxed to a sum amounting to nearly £100,000 a year. Does not this payment give them some claim to a protection against their being misled in cases in

\* The committee was appointed by the Council of the National Association on the 22nd Nov., 1859. For Report, see *Transactions*, 1861, p. 229.

which they are not in a position, or on equal terms, for obtaining information? Some check, in the nature of a preliminary inquiry; some sieve, as it has been termed, through which inventions should be passed, seems to be only just to persons so situated. What should be its nature and extent is too large a subject for us to enter on at the present moment, and we shall content ourselves with observing that it ought to be a very clear case in which the claim of an applicant persisting in the value of his invention should be refused. We may also say that the objection we have heard made to such an inquiry, as derived from the practice in the United States, would be inapplicable to a system in which less was attempted than in that country. If the American system is objectionable and defective because too much is attempted, our own is doubly so; because not only is too little attempted, but that little in many cases is so managed as to be positively prejudicial and pernicious.

2. *The Obstructiveness of Patents.*—These words are on the lips of every opponent of the patent system, or objector to patent rights, but attempt has rarely been made to condescend on any particular amounting to a practical grievance. Stated in the strongest point of view it amounts to no more than this, that persons proceeding on a certain line of investigation and invention find that they have been anticipated in some particular, and require to use an invention the subject of a prior patent, of which they cannot procure the use on reasonable terms.

The remedy for this is obvious. Apply the principle of compulsory sale, the operation of which under the Lands Clauses Act, in cases of land required for public undertakings, is so well understood, to any case in which the use of an invention the subject of an existing patent is required for working out a further improvement, whether it be or not the subject of a patent. A suggestion much to this effect was brought before the Social Science Association by Mr. Macfie at its Meeting at Liverpool, and his paper appears in the Transac-



tions of the Association for 1858.\* Whatever may be the extent of the grievance, or however small when reduced to its proper proportions, it is fitting that a remedy should be applied for such a possible state of things, and it is for the true interest of the inventor.

It is sometimes urged against any system of patents, that invention by any one person is but the forestalling in point of time of that which some other person would have invented. This may be perfectly true, and a good reason for limiting the duration of the grant, and for compelling such fortunate forestaller to grant a licence to his less fortunate competitor. But what argument does this afford for depriving such forestaller of all benefit from his skill or good luck? Is this the only case in which the first occupant is the admitted legal possessor and owner in perpetuity? What is the foundation of property but first occupancy? Upon what does the right to transmit property depend but upon expediency? Is it not for the public interest that each person should have absolute dominion and control over his own property, both for the present and the future? The distinction which exists between the enjoyment of patent rights and other rights is part of the original contract whereby the State gives to the inventor exclusive privilege for a limited time in consideration of the remuneration which he makes to the public. The patentee has occasionally been represented as a purchaser from the public for a limited time, and if this be a true view of the subject, no objection can be urged even in theory to his being compelled to admit others into a share of that of which he has been a purchaser under such circumstances. The objection not unfrequently urged on the ground of the extent of right and indefinite claim, or of imperfect and inadequate description contained in the specification, is founded on a misconception as to the essential conditions of the validity of a patent, which cannot be supported if the inventor claimed more extension than has been actually made, or if the same be not useful, or not

described in such manner as to enable any person acquainted with the subject to put the invention into practical operation.

The power to obtain a licence under a prior patent would, in the majority of, if not in all cases, compel the parties to an equitable arrangement amongst themselves; and if the objection be well founded, and a case really exists in which a patent is obstructive of further improvement, or presents a serious impediment to trade, the licence during the short period of the duration of the patent would be an effectual remedy. Nor does this remedy require legislative enactment. It is perfectly competent for the Crown to introduce any condition to this effect into the grant of letters patent. Patents as granted under the present system contain a condition very similar to the one now proposed, in favour of articles to be supplied by the patentee for the public service; so that the evil complained of might be effectually met by a modification and extension of the existing proviso.

3. *Litigation on Patents.*—The difficulties in protecting property in patents so as to preserve the rights of the inventor on the one hand, and of the public on the other, are confessedly great. Every one seems to admit that the mode of administering justice in patent cases is imperfect, but opinion is divided as to the remedy. Some advocate a special tribunal, and some a modification of the existing system.

Mr. Grove, whose name both in the legal and scientific world is identified with the subject, advocates the establishment of a separate Patent Court, and our readers will probably remember that he explained his views some time since in an elaborate communication to the *Jurist*. Mr. Grove is for the creation of a tribunal, like the Probate and Divorce Court, presided over by a judge equal in salary and position to those who occupy the benches of the superior courts, and armed with complete and exclusive jurisdiction in all patent cases. The advantages of the plan are manifest; we should have a tribunal specially fitted for the adjudication of questions for which our courts of law are confessedly unsuited; the

judge might be empowered to try either with or without a jury, and either with or without scientific assessors; parties would approach such a court with confidence; skilled witnesses would find there a discerning audience; and last, but not least, the judges and the Bar would be relieved of a class of cases in the ordinary courts, which impede regular business and with which they cannot adequately deal. When to all this we add that such a tribunal might take the responsibility of the primary examination of patents, now confided, rather in the way of a makeshift, to the law officers, and decide on the applications of inventors, whether in open court or in chambers, on some definite and recognisable principles, it must be admitted that the arguments in favour of a separate Court of Patents are numerous and cogent. On the other hand, it has been urged that the evil of different jurisdictions has already attained a magnitude in this country which must stand condemned alike by practical lawyers and scientific jurists; that patent business, considerable as it is, is not sufficient to justify the creation of such a court as is proposed, and that the business under a good system might be expected to decrease; that it would be difficult to find men competent to fill the office of judge; and, what perhaps is more to the purpose than the other objections, that no adequate funds exist to defray the cost, which the House of Commons would not be prepared to cast on the Consolidated Fund. Impressed with the difficulties attending so great a scheme, Mr. Webster has proposed a more modest solution, by recommending that scientific assessors should be provided for the existing courts, who should assist the judges in disposing of patent cases, and enable them to dispense with juries. In support of this plan, or of something similar, it is urged that the real trial of a patent case is in the court of appeal, and consequently that the simpler you make the determination of the issue of fact, the better for all parties. The cases in which a trial by jury as ordinarily constituted can be of service are rare; the whole trouble of preparation and the expenses of

such a trial amount practically, in nine cases out of ten, to no more than serving as the prelude to the settlement of a special case for the consideration of the court, and which may be the subject of appeal to the Exchequer Chamber and the House of Lords. The value of property of this description is in some cases so great, and the distinctions in the application of the law to the facts are so refined, that it would be impossible to deprive either party of the right of appeal to the highest tribunal. If this be so, it is argued, why create an expensive court to do a very simple thing?—if the only function required at the preliminary stage is to eliminate and ascertain the real facts for a higher jurisdiction, what need is there for more than an ordinary trial, perhaps with the assistance of assessors; or at most for a scientific investigation before three persons, as recommended by the Manchester Patent Law Reform Association?

These questions, and others of a like nature, will doubtless receive the careful attention of Her Majesty's Commission, whose Report we shall await with the greatest interest. The principles of Patent legislation have made great progress for many years past; the Act of 1852 was a most salutary measure in the main, though capable of considerable improvement; and it will now be for the Government and the Legislature to take a further step in advance, guided by the experience already acquired, and enlightened by the information obtained by the Commission, and their deliberate judgment thereon. England, of all countries in the world, is most interested in obtaining a sound and beneficial patent law; her manufacturers, her merchants, her men of enterprise and genius, demand this boon from their legislators, and it will be singular indeed if, after all the labour and thought which have been devoted to the subject, the boon should not be obtained.

There is one other point on which we would add a few words. A considerable sum, generally known as "The Inventors' Fund," being the surplus of fees levied on patentees beyond the necessary official expenditure, has accumulated in

the hands of the Patent Commissioners, and the question has arisen, In what way can this sum, and any future surplus, be best employed? Several projects have been advanced for this purpose, of which the following are the most noticeable:—

1. The reward of meritorious inventors by the purchase of their patents.

2. The building of convenient patent offices, with a suitable museum and library.

3. The reduction of fees to such an amount as may be sufficient only for the maintenance of the patent system.

Each of these schemes has its strenuous advocates, and for each, as is universal in such cases, a good deal may be said. We should be inclined to add to the catalogue by hinting that such a fund as this might be legitimately applied to smoothing the way for any advantageous alteration in the law; as by paying part of the expense attending the creation of any new court, or in making compensation to any present recipients of fees, *e. g.*, the law officers, whose duties and emoluments it might be found advisable to terminate.

We can hardly close this somewhat desultory article more profitably than by quoting the opinion of Lord Stanley in reference to this part of the many-sided question we have discussed. In speaking of the surplus fund his Lordship says:—

“The fact that a considerable surplus does exist,—the certainty that it will largely increase, are both admitted. Equally indisputable is it that the taxing of inventions is an expedient never contemplated by the framers of the Act of 1852, and unjustifiable, even in the utmost pressure of financial distress. The latter point requires no argument. Inventors, therefore, demand that this tax should cease, and that patent office fees should be henceforth applicable only for patent office purposes. When once the Treasury ceases to have an interest in the amount of fees collected, the question what those fees should be, and under what limitations it may be expedient to levy them, will present fewer difficulties. The scale of fees as fixed by the Act of 1852, was a com-

promise with the Chancellor of the Exchequer, Sir Charles Wood, in the uncertainty as to the number of patents that would issue; now that experience has shown the amount which those fees may reasonably be expected to yield, the amendment of the legislation which caution dictated, and the appropriation of the surplus to inventors' patents, would be only to carry out the principles of that first instalment of reform in the patent system."

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#### ART. VIII.—FRANCK ON BODMERIA.

*De Bodmeria secundum Jus per se, nec non secundum Jus Germanicum, Hanseaticum, Borussia, Danicum, Norvegicum, Suecicum, Batavicum, Anglicum, Russicum, Gallicum, Italicum, Hispanicum, Lusitanicum, Brasilicum, Romanumque.* Scripsit CAROLUS HERMANNUS HENRICUS FRANCK, Doctor Juris Utriusque. Lubecæ: Impensis Librariæ Dittmerianæ. Londini: apud W. Maxwell. Parisiis: apud A. Franck. 1862.

THE origin of the custom of lending money on bottomry is to be ascribed mainly to the prejudice and laws against usury that until recently obtained in almost every age of the world. Bottomry is also connected in principle with the doctrines of general average and salvage, as well as of insurance. If we consider the nature of the transaction itself, however, it will be found to be more nearly akin to partnership than to any other branch of commerce. The laws against usury could be evaded only by means of the lender becoming himself an adventurer. Insurance was unknown at the time of the first rise of this description of contracts. At present, most of the juristical relations of bottomry may be determined by the analogy of insurance law. But it is to the custom of partnerships, and the commercial usages which have in every country sanctioned almost every variety of

such associations, that bottomry, historically considered, is to be mainly ascribed. The origin, indeed, of a usage now universal is comparatively unimportant, except where it becomes necessary to trace out its juristical relations with philosophic accuracy, and a strict regard to its essential nature. The author of the treatise before us first gives an account of the relations of bottomry to the natural or moral law, and then passes on to the exposition which it has received in the various codes of the different leading States of Europe. He has not bridged the passage, so to speak, from his transcendental speculations to the dull realities of authority and case by any sketch of the rise and development of the practice of bottomry. This is the more strange, as in a subsequent part of his work he declares his opinion to be that but one description of bottomry (*bodmeria voluntaria*,) was known to the ancients and that bottomry incurred for the sake of the adventure (*bodmeria necessaria*) has been a development of comparatively modern date. It appears from Valin\* that some writers of the French nation had supposed that this contract was unknown to the ancients, and was peculiar to France. That author refutes this opinion, the absurdity of which, however, as also of the statement in the Guidon† to the same effect, is qualified by Emerigon's observation that it was intended to apply only to the form of the contract. Bottomry in some shape must have been coeval with the first spread of maritime commerce, although, like every other invention of social art, it probably has undergone a genetic development.

The author professes to discuss the subject-matter of his treatise both according to the principles of natural justice, and the municipal laws of the leading States—*et secundum Jus per se et secundum Jura civitatum majorum*. The phrase *Jus per se* is novel. This the author admits; but does not seek to justify. He proceeds, however, to explain its signification, and its relations to municipal jurisprudence, especially as

\* 2 Valin Com.

† Le Guid. 18, art. 4.

regards the question of the relative authority of natural and positive law. He defines *Jus per se* to consist of those laws which the Deity has directly impressed upon the universe—*istud quod Deus ingenuit rerum universitati, cujus fons Deus est non homines*. If we except physical nature, the ultimate form of expression for which is no doubt a system of laws and forces, there is no law which is not an excogitation of human reason, and, therefore, only mediately derived from the Deity. In closer harmony with the peculiar point of view from which Dr. Franck regards *Jus per se*, would be its definition as consisting of that portion of jurisprudence without which human society could not exist. The phrase, however, is peculiar, and therefore its philosophic explication is not very important. It is, as we have said, used by the author as a synonyme for the natural law. He then proceeds to develop his views regarding *Jus per se*, and bases it, in respect of its physical data, upon the marks of design perceptible throughout all created nature. “*Animadvertimus*,” Dr. Franck observes,\* “*in omnibus rebus inesse relationes*.” This somewhat sententious opening reminds us of Butler’s exquisite Analogy, and its postulate: “All things are double one against another, and God has made nothing imperfect.” This description of nature, however, by no means illustrates the idea of law, which is essentially connected with causation, or a change of state. The primary notion of law is connected with morality, and denotes a right use of reason, or an exercise of active power in obedience to the moral faculty. The use of the term in respect of physical phenomena is altogether derivative and analogical, and is in fact only allowable in respect of correlative phenomena or uniform sequences of changes. To speak of a law of nature, therefore, with reference to the contemplation of any existing state of things, without regard to the succession of their phenomena in time, is to mix up the notion of active power with that of rest—of order in time with that of order in place. The complete

\* Præfatio, p. 1.



expression for an organized whole is, as is correctly observed by Dr. Franck, found in *Universitas*,—a term almost exclusively applied to the leading seats of learning, on account of its exquisite adaptation to express the due organization of a school of mental and moral discipline. Dr. Franck's view of law having proceeded upon an erroneous, or rather peculiar basis, we cannot be surprised that a technical reference to his first conception affects, and somewhat distorts, his subsequent reasoning. Thus he describes action to be a change of relation. But this is merely the effect, and not the type, of active power. He expresses himself with a keener appreciation of the philosophic, as well as of the popular, notion of law, when he states subsequently that a change of certain relations is made according to invariable laws. Law is, in short, a phase of active power, common to certain phenomena. A law of relations, as existing in place, is but an expression for order, for the sublime or the beautiful, and is widely different from the essential signification of the term law itself.

Having stated law to consist in a change of relations, the author proceeds to apply his theory to social intercourse. Each man is the subject of an infinite variety of relations both towards the Deity and towards other men. These relations, moreover, are themselves perpetually undergoing change. One class of these changes, barter, is selected by Dr. Franck as the medium of applying his views. Cases of barter, *permutatio præstationum*, are continually occurring. Here we find Dr. Franck again expressing himself according to his peculiar notion of law as denoting a case, rather than a law, of state, when he says *Justitia in rebus semper fit, in hominibus injustitia cogitari potest*. The totality of being may, indeed, be ultimately expressed as a system of laws; but all such extremely transcendental logic is somewhat out of place in a juristical treatise having any pretensions to be considered practical. The author is too prone, perhaps, to travel out of the ordinary arena of a text-writer. Thus he defines *Prestatio respondens*, or obligation, to be, “*ea quæ supplementum entis*

*mutue perficitur secundum Dei voluntatem.*" This exposition is obviously a mere *petitio principii* awkwardly expressed, if it be anything more than the truism that a natural is a religious obligation. Our author considers *Jus per se* to be perfect; but municipal or civil law—*Jus derivatum*—to be imperfect. This is true only so far as *Jus* is concerned objectively. In its subjective aspect, in its relation to the mind either of the legislator or the jurist, positive law is far more easily comprehended than the natural law; for positive precepts are nothing more than statements of facts, embodying the idea of a human or at least a derived authority prescribing their occurrence. The author, at the close of his exposition of *Jus*, arrives at a conclusion which is perfectly absurd—*Sane id quod fit, quoniam semper cum voluntate Dei fit, semper Jus est si spectamus Deum, sed si spectamus homines singulos summa injuria esse potest.* Here, certainly, is a compendious, but we think an infelicitous, explanation of the origin of Evil. How much better does Butler describe the will of the Deity when he states it to be conditional and not absolute. It is thus incapable of being contradicted, and yet justly annexes rewards and punishments to certain actions. The freedom of the will is another question which has its own proof, viz., experience.

Dr. Franck does not highly approve of the definition of *Jus* in the Institutes as "*ars æqui et boni.*" This is, however, we think, a good definition of *Jus* considered as equivalent to *Jurisprudentia*. It was not, indeed, so meant by Tribonian, who subsequently gives a definition of *Jurisprudentia* itself. *Jus*, however, is most usually, if not always, used to denote the science of morality, or the ethics of law, rather than the application of either natural or positive precepts. Grotius' notion of *Jus* as a dictate of right reason, &c., is as good a point of view as any other whence to contemplate the possible analysis of a single idea, which cannot be resolved into any more ultimate elements. Kant's definition of *Jus* as *circumscriptio libertatis singulorum ut omnes coexistere possint*, exemplifies

an error of a different kind, and in the fundamental conception which it embodies coincides somewhat closely with Dr. Franck's view of law as a state of relations. Prior to the time of Hartley the true theory of moral sentiments was completely obscured by their inapt exposition as forms of the understanding. He and his successors of the same school have conclusively shown that right and duty apply to phases of human conduct that are taken cognizance of by a faculty distinct from reason, though of course inseparably connected with it.

It is not strange that the relations of bottomry to the first principles of jurisprudence, or *Jus per se*, should have attracted the attention of our author. The legitimation of bottomry being an exception to the anti-usury code of the mediæval age, difficult cases of bottomry could not well be determined without a reference to the more recondite principles of law. Indeed, the whole maritime code is mainly based upon the *Jus gentium*, considered according to its definition in the Institutes as consisting of those elements of prescribed duty common to the civil codes of all nations—*quod naturalis ratio inter omnes homines constituit*. It is in this sense that we are to understand the saying of the Emperor Antoninus: *Ego quidem sum dominus terræ; lex autem maris*. The laws of the Hanse Towns have been cited as authorities of more or less weight in our Admiralty Courts; and there can be no doubt that if a point in bottomry new to English law was to be discussed in our Admiralty Courts to-morrow, the Institutes, or even any continental code, provided that it was not professedly based upon local customs, could be referred to for information of value. There is, in short, a common law of the sea, but, unlike the common law of the land, it is to be found in general customs, almost all of which may be readily deduced from the first principles of justice. A statement of the relation of bottomry to *Jus per se*, was, therefore, a very appropriate introduction to a treatise aiming at a philosophic review of the various maritime codes on this subject.

The author when treating of bottomry *secundum Jus per se*,

describes it as comprising, first, contracts of bottomry properly so called ; secondly, as including contracts of *respondentia* ; and thirdly, as another name for any wager on the issue of the adventure. The curious reader will find three forms of bonds of this third sort in the appendix to the treatise of the Dominion of the Sea and Body of Sea Law.\* Dr. Franck notices a fourth class of *quasi* bottomry contracts, such, for instance, as a loan for agricultural purposes dependent for its repayment solely upon the proceeds of the crop. This sort of loan was probably not so rare during the period when the laws against usury were in operation as they are at the present day. He also distinguishes between an ordinary loan (*bodmeria voluntaria*) and general and particular average costs (*bodmeria rei pignoratæ causâ necessaria*). There is no essential distinction, however, between these descriptions of loan, all of them being, *ex vi terminorum*, dependent for repayment upon the issue of the adventure. A general average expenditure, as distinguished from a general average sacrifice, is no doubt very different from a bottomry loan. But a reference to such a description of expenditure being completely outside the scope of a treatise on bottomry, the author could not have meant to allude to such.

The author discusses the politico-economic relations of bottomry both in point of justice and utility. He refutes the current opinion that the interest on a bottomry loan can be greater than if the repayment of the principal were insured by a separate contract. We are disposed to think that where the lender is his own insurer, the maritime interest ought to be even less than if a third party intervened. For, although the rate of profit is *cæteris paribus* the same in all branches of commerce, yet, as the lender in bottomry has to exercise a certain scrutiny before granting the loan, this trouble suffices also to let him know for every other purpose the degree and nature of the risk. He can, therefore, insure against the hazard at less cost than a third party not already possessed of the necessary information. The difference, however, as to the

\* P. 659, &c.

rate of interest in both cases cannot be considerable. It was owing, perhaps, to a mistaken view of the nature of this difference in the rate of interest as much as to a concern for the interest of the owner that the legal doctrine was established, that the master is not to borrow on bottomry if he can raise the necessary funds by any other means.

Dr. Franck is of opinion that, according to first principles, or, as he prefers to express it, *secundum Jus per se*, the master ought not, before contracting a loan on bottomry, either to consult the crew or any consular or judicial authority. Such a circuitous proceeding appears to our author to be unnecessary, and calculated to weaken the master's authority. We do not by any means coincide with Dr. Franck in this opinion. It appears, indeed, to be supported by the inutility of such a proceeding in the case of a general average sacrifice. When a sudden and unusual peril threatens to destroy both ship and cargo, it is no time, we admit, for the master to hold a general consultation with his crew. But a bottomry loan raised in port is a very different matter, and the opinions of the most experienced of the crew ought, we think, to be taken before it is contracted. Such a course of proceeding could not weaken the authority of the master, for he is not *virtute officii* competent to contract a bottomry loan unless it is indispensable. The consent of the crew would, therefore, be a security both to the master and lender. Under the heading *de debitore bodmeriæ*, the author discusses the question whether the master can, *virtute officii*, contract a loan on bottomry. The owners are, as a general rule, bound by all contracts of the master for which his office affords the presumptive authority, even though, in point of fact, it do not extend to such. Molloy, book ii., chap. 2, sec. 14; *Boucher v. Lawson*, Rep. Temp. Hardwicke, p. 85; Story on Agency, chap. 6, sec. 116. The leading Continental States have adopted the same rule, qualified only by a few limitations. Roccu's Not., 11 to 18 inclusively; Not. 26, 27, 28; Not. 49, 65; Guidon, chap. 18, art. 4, and Cleirac's Com. thereon; French Ordinance, liv. 2, tit. 8; Des Propriétaires de

Navires, art. 2, and the Commentary of Valin thereon; Pothier, Charter Partie, sect. 2, art. 3; Welwood's Sea Laws, tit. 15. The obligation of the owner in respect of the master's contracts in bottomry are governed by the same principles as those that apply to his contracts in general. They are treated of in the civil law under the same head: (Dig. de exercitoriâ actione). The *onus* of proving that the bottomry loan was *necessary* rests, according to English law, on the lender, *Rocher v. Busher*, 1 Starkie, 27; *Palmer and others v. Gooch*, 2 Starkie, 428. Dr. Franck considers the rule thus so well established in our law to be of universal force, or at least to be binding according to first principles, *secundum Jus per se*.\* We do not, however, by any means perceive the soundness of this position. *Omnia presumuntur rite esse acta*. The owners, therefore, ought, we think, to be presumed to have appointed a person who would not improperly hypothecate the property entrusted to him. In a case decided in the Admiralty Court in Scotland in 1807, *Craigie v. Ogilvie and Tygett*, cited in Abbott on Shipping, 8th Ed., 141, the judge recognised a distinction between the furnishing of stores and the loan of money, considering the *onus* of proving the necessity of the loan to rest on the lender only in the latter case. The English rule does not go to this extent, although it requires a less degree of proof in cases where the loan consists of supplies than where it consists of money. The rule in *Craigie v. Ogilvie* might, we think, be very safely admitted. At all events, it is the rule which we should deduce from *Jus per se*. The lender on bottomry is certainly not bound, even according to English law, to see to the application of the money he advances; vide *The Gratitude v. Mazzola*, 3 Robs. Adm. Rep., 272. The American rule on this point appears to be very sound. It raises a presumption in favour of the lender, that he instituted the proper inquiries and was reasonably satisfied of the existence of a necessity for the loan.†

In our English code the lender of the money is also bound to ascertain whether the necessary supplies could not have

\* P. 12.

† Parsons on Maritime Law, p. 419.

been obtained on the personal credit of the owner, without resorting to the bottomry bond. *Heathorn v. Darling*, 1 Mdo. C. C., 5; *The Augusta*, 1 Dods. 286, 287. This rule probably sprang, not so much from any jealousy of the law in respect of the master's opportunity of injuring or defrauding the owner by contracting unnecessary bottomry loans, as from its abhorrence of all usurious transactions. Perhaps the supposed inconsiderateness of all seafaring men has also had some influence in establishing the rule. Not only has the lender thus to take into account the necessity of the loan itself, but also of the particular mode of its being contracted. The difficulties of the lender are somewhat diminished by the statute 3 & 4 Vict., c. 65, s. 6, which has conferred upon the Court of Admiralty jurisdiction to determine what are necessities in the case of foreign ships. The case of *The Gospatrick*, 4 Jur. N. S. 742, throws much light upon the scope of this enactment. Dr. Franck is of opinion that the lender on bottomry should, besides establishing the necessity of the loan, also prove the absence of the owner. In other words, Dr. Franck considers\* the power to borrow on bottomry is not implied *secundum Jus per se* in the office of master, but may be connected therewith by special circumstances. As the master, however, cannot well be said to enter upon the discharge of his duties until the ship puts to sea, the question cannot often be conceived as arising in practice. If it were not useless to speculate on the relations to first principles of a rule now inflexibly established in our courts, we should feel disposed to contend that, according to *Jus per se*, the master has inherent power to borrow on bottomry. The contrary, indeed, is the rule laid down by all states: Hanseatic Ordinances, art. 58; Hanseatic Ordinances of 1614, tit. 6, art. 1; French Ordinances, liv. 2, tit. 1; Du Capitaine, art. 17, and liv. 3, tit. 5; Des Contrats à la Grosse, art. 8; Emerigon, tom. 2, p. 424; Molloy, book ii., lib. 11, sect. 11; Weskett, 4, tit. Bottomry, sect. 20, 23; *Lister v. Baxter*, 2 Stra., 695. Even in the present days of



railways and electric telegraphs the question has perhaps lost none of its legal importance.

The saying of Oxenstiern, *quam parvâ sapientiâ regitur mundus*, has in modern times received numerous illustrations from the many advantages that have resulted to commerce from the removal of the restrictions upon private enterprise which an ill-judged system of bureaucratic intervention had imposed. Our allies still groan somewhat heavily under the bureaucratic yoke. They forbid, for instance, an insurance or the contracting of a bottomry loan on the freight only, unless it is actually earned at the time when the contract is entered into. Dr. Franck's remarks\* on the impolicy of such a restriction are exceedingly sound and sensible. He correctly states the fundamental principles of insurance to be, first, that the insured is to suffer no detriment or to gain any advantage by any casualty happening to the thing insured. The French law, which prohibits the insurance of contingent freight, *fret à faire*, as distinguished from *fret acquis*, or freight actually earned, clearly violates the first of these principles. The German and English codes, on the other hand, allow the whole freight to be insured, and thus give the insured a slight interest in the failure of the adventure even at the outset, before much expense has been incurred with respect to wages and provisions. With respect to insurance and bottomry transactions regarding the freight, we think a close adhesion to the rule prescribed by Dr. Franck would be more troublesome than it is worth. The English rule, which obtains likewise throughout Germany, Italy, Portugal, and the Hanse Towns, is sufficiently correct for all practical purposes. In cases of general average, as the value of the freight at risk when the general average sacrifice was made can be readily estimated when the adjustment of the general average contribution takes place, the rule advocated by Dr. Franck may no doubt be readily applied. With this view, the General Average Congress at Glasgow in 1860, in their last rule, recommended that any legislation on the subject

\* P. 20.



of general average should provide "that in fixing the value of freight the wages and port charges up to the date of the general average act ought not to be deducted, and the wages and port charges after that date ought to be deducted from the gross freight, at the risk of the shipowner." We do not see, in fact, how the rule preferred by Dr. Franck could be applied to freight. For, though the capital to be expended in gaining the freight is only gradually expended, the capital which is to meet the cost of wages and provisions is set apart for this purpose, and may, therefore, for most, if not all practical purposes, be deemed to be at risk.

Furthermore, if Dr. Franck's rule were observed with the rigour which he prescribes, some portion of the freight should at all times continue uninsured, unless it were to be made the subject of daily insurance, and thus the first maxim of insurance law cited by our author be broken.

"Incident in Syllam qui vult vitare Charybdem."

The observations we have offered on this head respecting the insurance of freight, or contingent profits, apply equally to loans on bottomry on the freight only.

Our author gives \* a very able exposition of the essential qualities of the condition in bottomry, viz. the successful termination of the adventure. The creditor, being his own insurer, undertakes all the risk incidental to the adventure. But out of these perils the deterioration in value of the thing hypothecated by means of any *vice propre* is by most writers excepted. Dr. Franck disapproves of the principle of this exception. We think that the common rule is preferable to Dr. Franck's view, which would throw open a wide door to fraud. The consideration of this question, however, is not very important. Every species of adventure must, as a general rule, be successful; for no shipper transmits commodities that are likely to suffer much by any *vice propre* unless the price of the part sold is sufficient to replace the capital expended in its purchase together with the ordinary profits. An acci-

dental injury is of course nowise different from any other loss in its relations to bottomry, or insurance in general.

The concluding chapter of the First Part of this treatise relates to the proof of bottomry, and contains a statement of the essential requisites of a bottomry contract. It should describe, according to Dr. Franck, the names of the parties, the sum borrowed, the thing hypothecated, the condition of the agreement, the route and name of the ship, the name of the master, the rate of interest, the promise of repayment, the time and place at which the contract was entered into, and the subscription of the borrower's name. But the memorandum need not specify, Dr. Franck thinks, the nature of the adventure. The paramount necessity of expressly stating that the lender undertook the liability of the sea risks, in order to justify the reservation of the maritime interest during the period when the laws against usury were in force in almost every country, having ceased to exist, we think that any memorandum of agreement which would be regarded by a commercial man as a bottomry instrument ought to be held to be such by a Court of Admiralty, vide *Symonds v. Hodgson*, 6 Bing. 114; 3 B. & Ad. 50. In practice sometimes a bond, at other times a bill of sale, is made use of; *Johnson v. Shipper*, 2 Lord Raym., 982. There is, however, no one item the insertion of which we would consider to be more important than a description of the nature of the adventure, nor which would be in greater harmony with the principle of these contracts, viz., that the peculiar perils of maritime adventure constituted a sufficient ground of exception to the laws against usury. A curious point on this head was decided in the case of *Ex parte Halket*, 3. Ves. & Beames, 135, in which a bill of exchange drawn by the master on the owner as security for advances made to the master was not considered as an instrument of hypothecation, although it was accompanied with a verbal stipulation by him that the ship should be liable. If bottomry, however, be originally contemplated, no form of collateral security will affect the

essential nature of the contract; *The Augusta*, 1 Dods. Adm. Rep. 283. Questions upon this head, notwithstanding the repeal of the usury laws, are still important with respect to the jurisdiction of the Court of Admiralty. Dr. Franck's remarks on the proof of bottomry are meagre, and do not touch the question of jurisdiction, probably because in his exposition of *Jus per se* he contemplated merely the abstract relations of bottomry.

Dr. Franck gives *in extenso* the code of bottomry adopted by the delegates of the Germanic Confederation\* at Frankfort-on-the-Maine, in 1856. He finds a few blemishes in it, but pronounces it to be, on the whole, the very best maritime or commercial code that has been ever promulgated. He passes a severe criticism on the 684th Article, because it does not specify the essential characteristic of bottomry, viz. the risk incurred by the lender. The context, however, is a sufficient answer, we think, to this objection. We hope that the time is not far distant when, the gates of free trade having been for some time opened by all nations, they will see the expediency of adopting a single maritime code for all. The feasibility of such a desideratum cannot well be doubted, when we see a precedent set by that unwieldy body, the Germanic Confederation.

When treating of the English law of bottomry, our author gives us credit † for having been the originators of "maritime loans combined with hypothecation," by means of which the lender can enforce his claim, notwithstanding the loss of the ship. This, of course, is not bottomry, properly so called; nor could the lender in such a transaction have formerly stipulated for more than the ordinary rate of interest. It is, therefore, only an ordinary contract, and more likely to have been first used by the Rhodians than by ourselves. Our author's commentary on the English bottomry code is, perhaps, the most valuable portion of his treatise. In this department of his labours he criticises, distinguishes, generalizes, reasons in-

\* P. 65.

\* P. 191.

ductively and deductively, and cites authority and case with as much felicity as if his legal researches extended only to our Admiralty Reports. Only that his statements are given with a closer reference to the abstract propositions of the first part than the collocation of the divisions of his subject warrants, we think his chapters on the English law of bottomry would be found to have no inconsiderable practical value. As they stand, they are not without their value even to the practitioner.

Bottomry is treated of by the later writers on the Roman civil law, under the head of those contracts designated in that system as real, and is found in immediate connexion with the class of contracts called *mutui datio*. With the exception of very few headings such as *culpa, dolus, negligentia*, &c., there is considerable difficulty in applying most of the rules of the civil law to the complicated transactions of modern commerce. There is, therefore, the less reason to regret that there is no very copious repertory of juristical precepts on bottomry to be extracted, howsoever indirectly, from the civil law itself.

Our author, in his chapters on the Roman code on bottomry, discusses this branch of his subject with his usual discretion and analytical vigour. He seems to think\* that voluntary bottomry was the only sort used by the Greeks or Romans. But, if the Greeks had resort to loans not only for a single adventure, but also for outward and homeward voyages combined, which Dr. Franck admits, it is not likely that while their commercial speculations admitted of such complicated transactions, they had not recourse likewise to every expedient for raising money which the necessities of their commerce might require. Of the various terms found in the civil law which may be considered as referring to this class of transactions, Dr. Franck prefers the phrase "*trajectitia pecunia*," though the definition given of "*trajectitia pecunia*" by Modestinus (*Pandectarum*, lib. 10) as "*quæ trans mare vehitur*," strongly conflicts with Dr. Franck's exposition of the phrase. "*Usuræ nauticæ*" is,

\* Pp. 341, 348.

we think, a much more appropriate and less ambiguous designation for bottomry than that preferred by Dr. Franck, and appears to us to prove conclusively that loans on bottomry were not unknown to the Romans. He considers that the Roman law has been superseded almost all over the entire continent of Europe by the express promulgation of codes by the various states. It never obtained *proprio vigore* in England, although it has always received from our judges the consideration it deserved. Both on the Continent, and in England, therefore, though for different reasons, the civil law is to be regarded only as such presumptive evidence of the natural law as may be displaced by even merely ratiocinative proof of its injustice or inexpediency. It is, to use a phrase of Dr. Franck's, testimony only of *Jus per se*, and not its authorised exposition. It cannot, indeed, be expected to throw much light upon questions of bottomry, since so learned an authority as Dr. Franck appears to have some doubt whether cases essentially resembling modern contracts of bottomry ever occurred during the sway of Rome, and, at all events, denies that any description of bottomry, except of the voluntary sort, was in vogue in ancient times. Bottomry, *rei pignoratæ causâ necessaria*, being, according to Dr. Franck, unknown in ancient times, few cases of any kind of bottomry used then to occur, and hence, from the resort to voluntary bottomry only, he accounts for the rule of the Roman law that the master could not raise money on bottomry without express authority to that effect. A less technical and unsubstantial reason for this rule is, we think, to be found in the comparatively narrow limits of the commerce of ancient times, and the consequent difficulty of the master's obtaining the necessary supplies except in those places where the owner of the ship had a commercial connexion.

This treatise reflects the very highest credit upon its learned author, and shows him to be possessed of a mind capable of applying the most profound principles of jurisprudence to the infinitely varied details of commerce. His exposition of *Jus per se* is logical, elevated, and masterly. His account

of the Roman law of bottomry, or rather of those portions of the civil law that implicitly relate to a class of contracts under which those of bottomry may be not improperly ranged, is elegant and succinct. His commentaries on this branch of the civil law ought, we think, to have immediately succeeded his disquisition on *Jus per se*, and so have formed a convenient medium for applying the abstract principles of the first portion of the treatise to the different codes of leading maritime states of Europe. This defect of arrangement, however, is the less important, as the civil law is very barren of any general rules admitting of a practical application to contracts on bottomry of the present day. The arrangement of the matter of this treatise is in another respect also, perhaps, somewhat faulty. It is, we think, to be regretted that the author did not first give a statement of the fundamental principles of jurisprudence applicable to the various divisions of his subject, and then show in immediate connexion with each heading in what respects the different states of Europe observed, or deviated from, the precepts of *Jus per se*. It is with reluctance, however, that we notice imperfections in a work, which, on account of the scholarship, profound comprehension, and philosophic analyses exhibited by the author in every page, deserves our warmest commendation. This treatise is mainly written in Latin, the style of which constitutes no small portion of the general merit of the author.

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#### ART. IX.—THE COLLEGE, DOCTORS' COMMONS.

ON a former occasion we called our readers' attention to the many distinguished civilians who had adorned the old College of Doctors' Commons.\* In doing so we mentioned, in passing, that the latter would ere long lose its name and application under the blow of the auctioneer's hammer. The

\* Vol. xi. N. S. p. 265.

sale of the college will be an accomplished fact in the course of the current month.

If this were merely the sale of a good property in the City, by a London corporation, we should not have adverted to it more than to any other alienation which occurs in the changes and chances of human affairs, when estates, after having excited admiration by their compactness and integrity, finally undergo the fatal process of disintegration.

Laudas, insane, trilibrem  
Mullum, in singula quem minus pulmenta necesse est.

But the circumstances connected with the College of the Doctors having been so peculiar as to have induced the Legislature to convert a trust estate into a beneficial interest, we think that the story, as well of its acquisition as of its conversion, deserves commemoration in these pages. We will, therefore, show how the estate came to the Doctors, and how they acquired their present right to sell it for their own private advantage.

The facts stand thus: in 1567, Dr. Hervey, Master of Trinity Hall, Cambridge, and one of the Advocates of Doctors' Commons, purchased of the Dean and Chapter of St. Paul's, London, the lease of a ruinous building then standing on the site of the present college, and called Mountjoy House. He made a present of it to the Judges and Advocates of the Commons, and they afterwards repaired the old mansion so as to make it habitable for themselves and their wives. The Doctors thenceforth took up their abode in Mountjoy House and in the buildings which succeeded it after the Fire of London.

The lease was made to the Master and Fellows of Trinity Hall, in trust for the Doctors, for a term of ninety-nine years, to commence at the expiration of an existing lease which Dr. Hervey had also bought up. On this occasion the Dean and Chapter further covenanted that if the Master and Fellows of Trinity Hall should at any time during the before-mentioned term of ninety-nine years offer to surrender the lease, the Dean

and Chapter should, upon a fine of £20, grant them a new one for the same number of years.

Old Mountjoy House was burnt down in the Great Fire, and the Doctors were without an abiding place of their own. In 1670 they obtained a new lease of the property from the Dean and Chapter for sixty years, and shortly afterwards set to work to rebuild the College in its existing form.

The new lease was to expire in 1730, but previously to its expiration the Doctors applied to the Dean and Chapter to renew upon surrender agreeably to the terms of the covenant made in 1567. This the Dean and Chapter declined to do, being fortified in their refusal by the 14 Eliz., c. 11, which disabled Dean and Chapters, with other ecclesiastical corporations, from granting leases of houses in any city or town corporate for a longer term than forty years. After some squabbling both in Chancery and in the House of Lords, the latter judicature decreed that the Dean and Chapter should grant a new lease on the same trust as that upon which the old lease had been made, but for the term of forty years only.

This further lease was accordingly made. It expired in 1770, and the old litigation recommenced, by the Doctors filing a bill in Chancery praying that the Dean and Chapter might be compelled to grant a new lease on the same terms as that which had been directed by the Court in 1728. In 1767 the Lord Chancellor dismissed the Doctors' bill, and by his decree deprived them of all beneficial interest in the estate.

When the Doctors found themselves baffled in obtaining a lease upon easy terms, they made up their minds to effect a fair bargain with the Dean and Chapter; and with a view to enable themselves to treat with the latter without the intervention of trustees, they procured, in 1768, a royal charter of incorporation.

On the expiration of their old lease in 1770, they purchased a new one of the Dean and Chapter for a term of forty years,



and also obtained from the lessors an agreement by which the latter engaged to convey to them the freehold and feesimple of the estate for ever, in case such agreement should be confirmed and carried into effect by Parliament. The agreement was afterwards confirmed and carried into effect by a private Act, (the 23 Geo. III., c. 30). In the preamble of this Act it is stated that the object of the Fellows of the College was to procure and secure to themselves a fixed abode, and that the Act was passed for effecting that purpose. Time rolled on, and in 1857 the Doctors came to the conclusion that *quâ* such they required no fixed abode, and by 20 & 21 Vict., c. 77, they obtained power to sell the estate for their own private use and benefit. Whether the Doctors were influenced in taking this step by the recorded reasoning of Sir Boyle Roche, we cannot say, but they have as clearly by their actions ignored the claims of posterity as that gentleman is said to have done by his words.

There is much however that is grave and consequential in the act of the Legislature which has sanctioned the sale of the college. Though this is an age ripe and apt for the introduction of law which would have startled our forefathers, this, perhaps, is the most striking instance which has yet appeared of the prevalent laxity of legislation; and it is noticeable that it should have been enacted for the especial behoof of Doctors' Commons, so long the stronghold of conservatism.

In the enactment, however, there must be a principle, if we can but find it. It would, upon investigation, seem to be no other than this,—that a corporation may, if it so please the Legislature, be converted from life-tenants or trustees into beneficial freeholders, and no consideration that the public might have derived a benefit from the continuance of the trust should be allowed to militate against the conversion, unless of course the public, in the name of the poor, or other claims equally strong, have a definable and distinct interest in the application of the revenues of the property in question.

This principle, bold and subversive of timid restraints as it

is, is intelligible, and may possibly be applicable to other and analogous cases, as a protest against useless and unnecessary mortmain.

We will not venture to define what may be all the analogous cases, but we cannot forbear to point out a certain class of them which we think are of such a nature.

We all know that some of the corporate companies of the city of London possess large and princely [(ere long to become larger and more princely) estates in the North of Ireland. These magnificent properties they hold upon no particular trust, except to apply their revenues to the use and behoof of the members of these companies.

Here, we think, the example of Doctors' Commons might be beneficially followed. A participation of these estates amongst the members of the companies would, by bringing back a landed gentry to a soil from which it has been eliminated, operate more effectively to consolidate and improve the tenantry, than all the best endeavours which philosophy may dictate without the presence of resident landlords.

The beneficial influence of a housekeeping landed gentry is so mighty, that we scarcely fear to assert that a pack of hounds with a resident landlord will do more social good to a district than the best managed school, where there is no person of that grade and influence.

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#### ART. X.—THE METROPOLITAN AND PROVINCIAL LAW ASSOCIATION AT BIRMINGHAM.

**T**HE Metropolitan and Provincial Law Association is a Society of Attorneys and Solicitors, established in the year 1847, "for the purpose of promoting the interests of suitors, and the better and more economical administration of the law, of obtaining the removal of the many and serious grievances

to solicitors, and through them, to the suitors, and of maintaining the rights and increasing the usefulness of the profession."

Its history is, we believe, correctly stated in an article in *THE LAW MAGAZINE* for 1848, (N.S. Vol. VIII.,) and it will be sufficient, here, to say that its establishment was the result of a conviction among many eminent members of that branch of the profession in town and country, that much crude and unwise legislation, hurtful alike to the profession and the public, would have been avoided, if the experience and rights of the profession had been regarded and maintained. They felt that as attorneys and solicitors were necessary agents in carrying into effect all improvements in the law, it was an injury, not only to them, but to the public, to neglect their assistance or lower their status; and they resolved to organize in self-defence. They deemed it necessary that this organization should be distinct from the Incorporated Law Society, which, it is well known, has an official control by charter over the whole body of attorneys and solicitors. The constitution and purposes of that society unfit it for the popular and prompt action which is the necessity of a defensive organization. That there is no rivalry between the two societies is clearly evidenced by the fact, that several members of the Council of the Incorporated Law Society are among the most active on the committee of management of the other society, and that on almost all the important questions which have concerned the profession, the two societies have worked harmoniously together.

The difference between the action of the two societies is, perhaps, best illustrated by such a meeting as that which has just taken place in Birmingham. Since the year 1854, in addition to the ordinary business of the association, which is necessarily done in London, its members have held meetings in the principal towns and cities. At these meetings papers are read and discussions held on subjects affecting the interests of the profession. In this way the association has in turn visited Leeds, Birmingham, (twice,) Liverpool, Manchester, Bristol,

Newcastle-on-Tyne, and Worcester. Its second visit to Birmingham took place on the 7th and 8th of October; and, to show how attorneys and solicitors think and speak on professional topics, we present a very condensed account of the proceedings. The Chairman of the Association, Mr. T. Avison of Liverpool, first delivered his annual address, and after some congratulatory remarks said:—

“It appears to me that this forms a most fit occasion for putting the question to ourselves—Have these aggregate autumnal meetings of the association succeeded? I think, gentlemen, that there can hardly be but one reply to this question. I have been present at nearly all of our meetings, and I feel that whether we consider them as means of making us better acquainted with each other, or whether we judge of their success by the merits of the various valuable papers which have been read to us, we must pronounce them a success. It appears to me that one of the great evils to which our profession is liable is this, that we are too much isolated from each other, and that we act too independently. I believe that these are the great causes of our weakness as a body, and that we must seek in collective and co-operative action the means of raising us as a profession, and giving us that power which we ought to possess. Gentlemen, if we compare the position of this association at the present time with what it was when we met here in the year 1855, we shall find that we have gained much additional power and much respect. Our association is now consulted by the highest legal authorities, and the suggestions of our committee and members are invariably considered with the greatest attention and respect. I hope that I shall be able to satisfy you all upon this point before I close my present very imperfect observations. It now becomes my duty, as chairman of the association, to give you a short account of the endeavours made, and the results obtained by your committee of management, since the metropolitan annual meeting, held on the 16th of April last, up to which time you have all received similar information

concerning the operations of the present year from the last annual report printed and circulated among you, and with the contents of which I will presume you to be acquainted."

He then proceeded to narrate the proceedings of the committee in reference to the proposed law reforms of the last Session: The Land Transfer Act, the Law of Property Amendment Bill, the Joint Stock Companies' Act, Law of Partnership Amendment Bill, and many other measures. As an example of the good sense and activity of the committee, we select two paragraphs.

**"JUDGMENTS, &C., LAW AMENDMENT.**

"The Bill to amend the Law relating to Judgments, Executions, Statutes, Recognizances, and *Lites Pendentes*, introduced by Mr. Hadfield, proposed to abolish the charge on land of registered judgments. Now, however desirable it might be to alter this law as applicable to future cases, it appeared to your committee that it would be a change in the law which would very prejudicially have affected the rights of creditors by depriving them of the protection as to then existing judgments expressly reserved to them at the instance of the managing committee, by Lord St. Leonards' Act of 1860. Notice of opposing the second reading of the Bill was at once given by the Attorney-General, but out of deference to Mr. Hadfield the managing committee were unwilling to take active steps against it unless absolutely compelled to do so. They, therefore, wrote to Mr. Hadfield, urging their reasons and requesting him to withdraw the Bill. This, however, he declined to do; and the managing committee having received an intimation that the Attorney-General needed help in his opposition, they considered it their duty to prepare a full statement of their arguments against the proposed confiscation of existing securities, and embodied them in a petition against the Bill. This was presented on their behalf by the Attorney-General. After Sir William Atherton had delivered his speech, Mr.

Hadfield said he would not trouble the House to divide, and withdrew the measure.

“In order to show the vast amount of property that would have been affected (an amount almost incredible) had Mr. Hadfield’s Bill become the law, I would refer to a return which in May last was presented by order of the House of Commons. It appears from that return that ‘in less than two years, namely, July, 1860, to May, 1862, 3,668 judgments have been registered (or re-registered to keep them alive) in the registry of judgments, for the purpose of their being a charge upon landed property, and this is in addition to judgments on which satisfaction has been entered.’ The report also states that ‘there were within the five years preceding the 31st May, 1862, unsatisfied judgments amounting to £16,500,000.’

#### “BANKRUPTCY TRUST DEEDS.

“Another gratifying result of the endeavours of your committee is the general order of the Court of Bankruptcy of the 22nd May, 1862, directing that an attested copy of every trust deed registered after the 5th June last, under section 192 of the late Act, should, with a schedule of the creditors, be filed by the Registrar, as recommended in the last annual report of the association, and in a letter written to the Solicitor-General by the committee.”

Other topics referred to in the address were the questions of legal and medical coroners, and preliminary education, as to which Mr. Shaen made the following remarks:—

“The argument in favour of the appointment of a medical man to the office of coroner would equally apply to the appointment of a medical man as judge in a charge of murder by poison, as a coroner’s duties were purely judicial, the medical information necessary being supplied him in the evidence to which he had to apply the law in his summing up to the jury.” Adverting to the first three local preliminary examinations that had taken place under the new system, he said that “at that in February there were 23 candidates from London, Liverpool,

and Cardiff, of whom 19 passed; that at that in May there were 113 candidates from London, Birmingham, Bristol, Exeter, Leeds, Liverpool, and Newcastle-on-Tyne, of whom 77 passed; that at that in August there were 96 candidates from London, Birmingham, Bristol, Leeds, Manchester, Newcastle-on-Tyne, and Plymouth, of whom 74 passed. The percentage of those rejected was therefore 36·72, which, compared with other examinations, was, he considered, fair evidence that the examinations were a good test of the candidates' abilities. As to the immediate examinations, four graduates presented themselves at the Easter Term and passed, and at the Trinity Term four graduates and eight ten-year clerks presented themselves, and eleven of the twelve passed."

The first paper read was "On the Relations between the Profession, their Clients, and the Public," by Mr. G. J. Johnson, of Birmingham, a solicitor, who holds the appointment of Professor of Law at Queen's College in that town. The following extracts will show the style and character of this paper. After premising that its object was to point out a few of the mistakes constantly made about the profession by their clients and the public, the writer continued:—

"The first misconception, and root of all others, is the belief of the public *that law is for the most part a wilful complication by lawyers, for their own benefit, of what ought to be a few simple rules.* It is true that this fallacy is not often put into words, for it is just one of those absurdities which are refuted by putting them into plain English. It is as correct to say that hunger and thirst are the inventions of bakers and brewers, and kept up by them for their selfish ends. Nevertheless, some such belief is the unconscious sentiment of the great mass of our clients and the public. They verily believe that, but for us, the enormous legend of English law could be cut down into a little pocket volume, which everybody might buy at the railway stations for a shilling, and thereby become his own lawyer without having a fool for his client. Even so able and acute a writer as the author of "The History

of Civilization," adopted the same fallacy to the extent of arguing at great length that all our present and future legislation was, and must be destructive, and that the statutes would by and by be reduced to a minimum. I admit the constant destruction which goes on every session, but I see no prospect on that account only that English law will at present become more simple, because I notice that whilst we are repealing on one hand, we are adding statutes and cases to an enormous extent upon subjects unknown to the books fifty years ago.

"The reason of this is, that the law of any nation is simply the ultimate expression of its average morality; the hardening of that morality into institutions. English law is complex because English life is complex, and for the present there does not appear much probability of its getting simplified."

Illustrating this in detail, the writer then proceeded to the practical conclusion that the most rapid and extensive law reforms would not enable the lay public to dispense with professional assistance of some kind or other. Of course they might abolish attorneys and solicitors, but if they could not all be their own lawyers, they would simply fall into the hands of some of the species of the genus "agent," of whose malpractices the writer gave some striking instances. He continued:—

"Now let us straightforwardly say to our clients and the public, 'if you could get rid of us we should not blame you for doing so, but if your attempts to do so are not only futile, but costly, had you not better as sensible men keep us in the two objects which will be most beneficial to both of us, viz., improve our status, and remunerate us fairly?'"

On the improvement of status an account was given of the exertions of the association, now happily crowned with success, to establish an examination in general knowledge previous to articles; an object which the association has steadily pursued since its establishment, and which is destined to have a great influence on the well-being of the profession.

The next two papers were taken together, both having



reference to a subject of great interest to country solicitors,—the recent legislation as to transfer of land. The first was by Mr. W. S. Cookson, of Lincoln's Inn, and was confined to an examination of the "Act to facilitate the proof of title to, and the conveyance of real estates" (25 & 26 Vict., c. 53), in order, to use the writer's words, to ascertain "what it means, how the machine is to be worked, whether defects in it do really exist which, as apprehended by *The Times*, will require its amendment in many important particulars, and what its effects will be on our clients, their lands and their purses." After an analysis of the Act, the writer proceeded to point out numerous defects in its wording, arising from a disregard of the canon of legal composition, that the same word shall always be used where the same thing is meant; *e.g.*, "estate" is sometimes used in its legal sense, and sometimes in its popular sense, where, according to the interpretation clause, the framer of the Act meant "land." Registry is constantly used for "register," and register is constantly applied without explanation to the register of "estates," meaning "land," the register of title, and the register of incumbrances. He then continued:—

"The scheme of registration proposed by the Act appears to be open to several serious objections.

"The *first* objection arises from the difficulties and responsibilities which must often attend the preparation for the record of title, of an exact record in concise terms of the existing estates, powers, and interests in the land (s. 14). Nothing perhaps is more difficult to a lawyer than to express concisely, and with absolute accuracy, the whole effect of a written instrument. One of our most eminent conveyancers was recently asked which of the two he would prefer drawing for the same fee, the deed, or the concise summary of it for the record of title; and he unhesitatingly said the 'deed.'

"The *second* objection is the necessity involved, in indefeasibility of title, of finally determining in all cases, except those of disputed boundaries, which may be left undecided (s. 16),

the identity of the land with the description given of it in the deeds. This objection is forcibly stated in the petition of the Incorporated Law Society to the House of Commons, and need not be repeated. Every practising solicitor knows that in a great majority of cases the evidence of identity establishes nothing more than a reasonable probability.

“The *third* objection is, that the ‘record of title’ will inevitably become, under another name, a registration of assurances.”

The latter point was supported by a minute examination (which we regret our space does not enable us to set out at length) of several clauses of the Act.

The second paper, by Mr. John Turner of London, comprised an analysis, not only of the 25th & 26th Vict., c. 53, but also of the Declaration of Title Act, 1862 (c. 67). Of the principle of the latter Act, Mr. Turner fully approved, and thought it might be usefully adopted in many cases, and he also considered that “great credit is due to Government for overlooking political claimants in the appointment of Registrar under the recent Act, and for selecting the best man for the office, without regard to political interests. I think that this departure from a vicious system should be marked by the profession by a loyal determination to give the Act every possible support, and by furnishing suggestions for amendment where necessary.”

A very interesting discussion followed, in which Mr. Hope Shaw and Mr. Eddison, (both of Leeds,) Mr. Livett, (of Bristol,) Mr. Eden, (of Liverpool,) Messrs. T. Kennedy, Payne, and Shaen, (of London,) and others, took part. The principal difference of opinion was as to the tendency of the Act to produce a registration of assurances. The Yorkshire solicitors being in favour of such a system, finding that their own local register had worked well, and the London solicitors just as strongly condemning it, because their experience of the Middlesex registry was not favourable. The meeting were unanimous in their desire to adopt any sound and well-digested

measure which should save their clients the costs of repeated examination and re-examination of title. The rules and scale of fees had not then been issued, but it was generally feared that the cost of giving notices to adjoining owners would prevent the adoption of the former Act, except in cases where large estates were intended to be cut up for sale in small lots, and in which case an indefeasible title and a short conveyance would add greatly to the chances of sale.

The next subject brought before the association was the Partnership Law Amendment Bill of 1861, on which Mr. Arthur Ryland of Birmingham read a valuable paper. As the bill is to be re-introduced next session we extract the following account of it.

“ A bill for the amendment of the law of partnership was brought into the House of Commons and read a second time last session, and it is intended that early in next session it shall be re-introduced and referred to a select committee.

“ The subject is one peculiarly fitted, as it appears to me, for the consideration of our society; and I therefore propose to lay before you an outline of the bill, and some of the reasons which lead me to regard it as an important commercial law reform, deserving of your attention, and I hope of your support.

“ The growth or private history of bills I have often found useful in the consideration of their merits. I will therefore tell you at the outset the origin of this bill. It was prepared by Mr. Alfred Wills, upon the instructions of the Birmingham Chamber of Commerce, and with the sanction of other Chambers. These bodies you will, I think, admit, are entitled to speak with some authority on partnership law, but their opinions and schemes may with advantage be reviewed by a society of lawyers. I should regard the imprimatur of the Chambers of Commerce and of this association of law societies as the best recommendation which a bill relating to matters commercial could have; our statutes on such subjects would

be much improved if, in their preparation, they were subjected to their united criticism.

“The objects of the bill are twofold, (1) the extension of the principle of *limited liability* to *sleeping* or *loan* partners in trading concerns—and (2) the registration of persons constituting trading firms.

“The provisions of the bill as to *limited liability* are as follow:—

“The bill declares (s. 3) that it shall be lawful for persons to lend money to a trading concern upon the terms of receiving a share of the profits either instead of, or in addition to, a fixed rate of interest, without becoming thereby general partners. The term *general partner* is used to describe what we now understand by a partner, and in contradistinction to a *limited partner*, which words are used to describe a lender of money within the provisions of the Act.

“In order to entitle a person to enjoy this limited liability, it is required (s. 4) that he should register with the Registrar of Joint Stock Companies certain particulars, and comply with certain specified conditions—if any of these be neglected he becomes a general partner (s. 8).

“These particulars and conditions are as follow:—

“1. The names and residences of each partner, and whether a general or special partner.

“2. The nature and place of business.

“3. The firm.

“4. The sum lent by each limited partner—the time of advance and when repayable.

“Loans are to be registered within fifteen days, and are to be actually paid at the time named in registry or within fifteen days afterwards, and no part of the money lent shall be repaid, satisfied, or secured in any manner before the time stated in the registry.

“The firm is not to include the name of any limited partner; if it do, then such partner becomes a general partner.

“ Then follow provisions relative to the dissolution of firms having limited partners.

“ The bill declares (s. 10) that such partnerships shall be dissolved as to the limited partner on the expiration of the period for which the loan was granted, or by the death or bankruptcy of one of the general partners, and (s. 11) on such dissolution the loan becomes an ordinary debt. It may be renewed and then fresh registration must be made. It is required (s. 12) that upon dissolution by the death of a general partner an entry shall be made upon the registry.

“ It is provided (s. 13) that the general partners only shall be liable to be made bankrupt in reference to the dealings of the firm : but that on such bankruptcy, the limited partner shall not be entitled to receive any sum remaining unpaid, nor any interest or profits due to him as a limited partner, until all the creditors of the bankrupt whose debts were contracted during the limited partnership are satisfied ; and if a general partner shall be bankrupt within twelve months after the dissolution of a limited partnership, in other words, within twelve months after a loan has been repaid, the limited partner shall contribute, to the extent of the money he has withdrawn from the concern, in order to make up the deficiency of the bankrupt's estate in the payment of those creditors whose debts were contracted during the limited partnership.

“ The provisions of the bill as to registration are founded upon the preamble, that it is expedient that the real constitution of trading firms should be known.

“ It requires (s. 15) that every person who carries on trade either alone or with others under a firm which does not contain the surnames and Christian names of all the persons carrying on such trade—or which firm contains the name of any other person not in the firm—or the words ‘ & Company,’ shall send to the registrar a statement in writing of the names and places of residence of the persons constituting the firm. This statement is to be signed by each person therein named who is resident in Great Britain, the signatures to be attested

by a justice of the peace, banker, or attorney. Changes in the constitution of each firm are to be notified to the registrar (ss. 16, 18).

“Persons so registered may sue or be sued in the name of the registered firm, and service of process at the registered place of business shall be deemed good service on the person or persons constituting the firm.

“If any person omit to make required registration, such non-registration may be pleaded in bar to any action brought by him in respect to any contract made by the firm (s. 20).

“Such is the outline of the bill. We will first deal with that part of it which relates to *limited liability*. You will observe that it does not propose to limit the liability of any partner whose name appears in the firm as a partner; every such partner will continue liable to the full extent of his property, and this is obviously just. The only parties whose liability we seek to limit are those who in fact have never been trusted. If *all* the partners in a trading concern desire limited liability they must conform to the provisions of the Joint Stock Companies Act. We deal only with those partners who are associated with others in whose names the concern is conducted, and who are liable without limit. I am anxious to be clear on this point, as it is more convenient in referring to the principle I contend for, which I shall have frequently to mention briefly as ‘limited liability,’ instead of using the lengthy phrase of ‘the limited liability of sleeping partners.’

“And I wish to be understood, whilst condemning the principle of the unlimited liability of sleeping partners, as heartily approving of maintaining the obligations of all persons who have allowed their names to be used as an inducement to credit; in other words, of checking false pretences in contracts.

“Our bill is founded on the assumption that persons trusting a private trading concern contract with those parties whose names are in the firm, or who actively conduct its business as partners; and in order to check any false pretence from borrowed capital, which under the present system of loans at large

fixed rates of interest is not infrequent, we provide a registry of the particulars of loans, and impose conditions to prevent sham loans. So that if our bill becomes law, the dealings with firms having limited partners will be contracts entered into with the knowledge that such limited partners are not to be responsible beyond their subscribed capital, contracts precisely analogous to the contracts with insurance companies. We all well know that every policy of insurance, whether against loss from fire, or from loss at sea, or for sums payable at death, contains a clause declaring that the stock of the company shall alone be responsible for all claims in the policy, and that no proprietor of the insurance company shall be liable beyond his share in such stock. If every contract of a trading concern was reduced into writing, then an Act of Parliament would not be necessary. Each house would make its own law, and that without the most fastidious moralist raising any imputation of dishonesty or unfairness."

Mr. Ryland then proceeded to trace our present principle of the unlimited liability of dormant partners from the case of *Waugh v. Carver*, in 1793, (which case, as observed by Mr. Commissioner Fane, "was not law but mistaken political economy,") down to the present time, and cited against it the opinions of a numerous array of jurists, judges, political economists, and statesmen, in addition to the Report of a Select Committee of the House of Commons in 1851, and the resolution of the House itself in 1854, and concluded that part of the paper with the following summary of the arguments in favour of the principle of limited liability.

"The received principle of commercial legislation is to leave people to act for themselves, and not to restrict competition.

"Private interest is a better guarantee for caution than public superintendence.

"The interest of a community is best consulted by leaving to its members, as far as possible, the unrestrained and unfettered exercise of their own talents and interest.

“Capital without industry is dead, and so is industry without capital. It is the union of the two out of which all wealth arises. It is therefore most impolitic to discourage that union by saying to each accumulator, you shall not risk any portion of your accumulations for the aid of struggling industry or struggling ingenuity, on the terms of sharing the profits, if profits there be, without risking every farthing you have in the world.

“The principle of limited liability offers encouragement to talent and energy, which, in the absence of such a system, may find less means for their exercise and development. The introduction of the principle would tend not only to the pecuniary benefit of capitalists, but they would combine with it the advancement in life of some relative or friend in whom they have confidence. It would retain at home capital which is now sent abroad, and although this might lessen the value of money, it would increase the value of labour, and thus the public good be promoted.”

As to the registration of firms, Mr. Ryland gave instances where creditors had been set at defiance for the want of some means of discovering the actual members of a firm, and cited the second Report of the Mercantile Commission in favour of the proposed scheme of registration. In a very interesting discussion which followed, the desirability of the registration of firms was taken as too obvious to need argument. It was also generally admitted that the principle on which dormant partners were held liable, viz., that they took a part of the fund on which the creditors relied for payment, was one-sided; because if there were no profits then every servant and creditor who was paid took a part of the fund, and ought, if the principle were carried out, to be made liable also. Some objections of detail were taken to the bill, particularly as to the clause that the limited partner should refund in case of bankruptcy within twelve months. It was contended that it would be better not to impose any limit of time, which is easily evaded, but to make the liability to refund dependent on the



solvency or insolvency of the business on the retirement of the limited partner.

Closely connected with the subject of allowing persons to take a share of profits in lieu of an exorbitant interest on preferential securities, was a paper read by Mr. C. T. Saunders, (of Birmingham,) on "The Frauds of which Bills of Sale are the instruments, and the remedy for their prevention." After an historical review of the statutes and cases relating to transfers of chattels personal, the writer argued that the true and safe doctrine was that implied in Tyne's case, (3 Co. 80,) and expressly laid down by Lord Hardwicke in *Ryall v. Rolle*, (1 Atkyns, 165,) that all such transfers should be held fraudulent *unless accompanied by actual change of possession*. The contrary doctrine, that if the continuance of the debtor's possession was consistent with the forms of the deed it was not fraudulent, has been settled ever since *Martindale and Booth*, 3 B. and Ad. 505, (A.D. 1834,) and the increasing mischiefs arising from bills of sale led, in 1854, to the Act for their registration (17 & 18 Vict.)

The present state of the law the writer, as to conditional bills of sale, stated to be as follows:—

"1st. As between the assignee under a bill of sale and the other creditors of the debtor: the bill of sale may be made for an entirely antecedent debt, and for the express purpose of stopping a hostile execution. The mortgagor may retain possession of the effects, and a creditor who seeks to levy an execution upon the goods is compelled to withdraw.

"2nd. As between the assignee under a bill of sale and the assignees in bankruptcy of the debtor: a bill of sale may be given on the eve of bankruptcy, may comprise the whole of the bankrupt's effects, may secure an old-standing debt *accompanied with a present advance*, and if possession be taken the day before the bankruptcy takes place, the assignment will be valid in the absence of proved fraud, and the other creditors will lose their dividends. Of course in each case the deed must be registered unless possession be taken within

twenty-one days after the execution, when registration becomes unnecessary.

The various dishonest uses made of such a state of the law were then described, and the writer contended that the Act of 1854 had rather fostered and increased those mischiefs than otherwise. Bills of sale were more frequent than ever.\*

The only remedy, he argued, was to be found in a return to the old doctrine laid down by Lord Hardwicke, from whose judgment in *Ryall v. Rolle* he cited the following passages:—

“ It has been said in this cause that great mischief might arise to trade and credit from making securities of this kind void, because it might prevent persons from using their credit in trade, and that they will not be able to make a security without exposing their circumstances to the world, which may hurt their credit. On the other side it has been argued, that *a delusive credit is of still more dangerous consequence*. I will not say but that some inconvenience may arise on each part, but I will say that very great inconveniences may arise by giving an opportunity to people to make such securities, and yet appear to the world as if they had the ownership of all these goods of which they are in possession, when perhaps they have not one shilling of the property in them; and further I will venture to say that it was the design of the Act of Parliament (13 Eliz.) to prevent this, for the Act was made in the simplicity of former times, long before those large and airy notions of credit prevailed which have since been introduced.”

Owing to the lateness of the hour at which this paper was received, it had not the advantage of being discussed by the meeting, but the general impression was that the writer had not overstated the frauds on creditors of which bills of sale were the instruments.

Mr. Henry Reynolds (of Birmingham) read a short paper upon “ Probate Duty on Leaseholds in Mortgage.”

\* The number registered being 7000 in 1856, 7,500 in 1857, 8000 in 1858, 8,500 in 1859, 9000 in 1860, and 9,818 (!) in 1861.

The question discussed was, If a person die possessed of leaseholds (say at the value of £2000) which he has mortgaged for £1,500, must his executor pay probate duty on the whole £2000, or on the *net value* of his testator's actual interest? The usual practice has been to pay duty on the whole gross value, without deducting the mortgage, and this practice is founded on the 55 Geo. III., c. 184, s. 38, which enacts "that the *estate and effects* of the deceased shall be valued" (for the purposes of probate) "*without deducting anything on account of the debts due and owing from the deceased.*" Mr. Reynolds, whilst admitting that a mortgage, if created by the testator himself, was undoubtedly a "debt owing by him," contended that the "estate" of such a testator in the mortgaged property was only the value of equity of redemption subject to the mortgage, and that any executor might conscientiously make the required affidavit on that ground. He stated that he had pursued that practice for fifteen years, and no objection was taken by the Stamp Office until 1858, when Mr. Timms threatened Exchequer process against one of his clients who had so acted, but upon his submitting his reasons, the objection was waived, and the account was passed, as it had been in several subsequent cases. He also pointed out that this practice was far more beneficial to clients than paying the duty first, and getting a return afterwards on account of debts, for the latter remedy could not be pursued without paying off the mortgage within three years, which was often inconvenient and sometimes impossible. In small cases especially, the cost of getting a return of duty was greater than the sum returned. The discussion which took place ended in a resolution requesting the committee of the association to obtain, if possible, an official decision of the question.

Another paper, not so purely professional in its subject, but containing many valuable suggestions and remarks as to the laws relating to the relief and settlement of the poor, was read by Mr. C. A. Smith, of Greenwich.

As is the custom of Englishmen, the members of the

association alleviated the graver discussions by dining together on the first day, and on the second enjoyed the hospitality of their Birmingham brethren at a dinner presided over by Mr. J. W. Whateley, the President of the Birmingham Law Society.

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ART. XI.—THE LEGAL RIGHTS OF HUNGARY.

*The Addresses of the Hungarian Diet of 1861, to H. I. M. the Emperor of Austria, with the Imperial Rescript and other Documents. Translated for Presentation to Members of both Houses of the British Parliament. By J. HORNE PAYNE, ESQ., M.A., Lond., of the Inner Temple, pp. 101. London: Bell and Daldy, 1862.*

WITHIN the last fifteen years a remarkable change has come over the political feeling of this country. From 1815 to 1848 the people of England were, in a great measure, occupied by their own internal affairs; the lassitude which followed the tremendous war against the first Napoleon, the long arrears of legislation that had to be made up, the growth of the popular feeling in favour of a reform of abuses, the struggle that grew fiercer every year between the occupants of office and the advocates of change, all conspired to rivet the attention of the nation on its home politics. When the great Bill had become law, and the current of popular impulse was poured into our Government and Legislature, so much had to be done to retrieve the neglect of thirty years, and to harmonize our institutions with the living wants of the nation—law reform, municipal reform, administrative reform, the removal of religious disabilities, the simplification of the tariff, and the consequent freedom of trade, so completely occupied the political mind of both parties in the state—that foreign affairs were looked on as of minor importance, only claiming a brief consideration when a Syrian war, or a Greek or Tahiti squabble, made a brilliant debate in Parliament, and

a nine days' wonder at the clubs. During by far the greater part of this period of our history, the profound tranquillity which reigned over continental Europe encouraged, if it did not justify, some apathy on our part; and it is singular enough, that the conclusion of the last civil contest in which the passions of Englishmen were seriously roused, should have nearly coincided with that terrible outburst of revolution on the Continent, which has broken up the dreams of universal peace, produced already two bloody wars, and perplexed every nation, and England not the least, with that fear of change, and anxious speculation as to coming events, which inevitably make the foreign relations of a state its leading political idea.

If any proof were wanting of the absorbing nature of our interest in foreign affairs, it would be found in the influence which they exert over the state of our political parties. Twenty years ago, an eight-shilling duty on corn could convulse the kingdom; but, keen as party strife was in those days, we doubt whether a ministry could have been formed or overthrown on a pure question of foreign policy. At the present moment, when the most eloquent of agitators fails to raise a breeze for even a moderate electoral reform, the Liberal party prolongs its tenure of office through its sympathies for Italian freedom. Or rather, it would be more just to say, that the Liberal party have this advantage in the present balance of political strength,—that in the one branch of politics which commands any real interest, they possess a clear and definite policy, approving itself to the judgment of the nation, while the Conservatives fail to show any foreign policy at all. Crippled by their new Ultramontane allies, and perplexed by their traditional conviction that the treaties of 1815 had the same origin as the Ten Commandments, they are unable to announce any principle which will bear the light of popular debate. The Liberals, on the contrary, know what they mean, and are not afraid to proclaim it; their principle is much the same as that enunciated (before its time) by an old Scotch patriot on the scaffold—that the Almighty has not created the

millions of the human race saddled and bridled for use, and a few score booted and spurred to ride them. They hold the right of every people to judge for itself as to its own institutions and rulers; they are opposed to any invasion of just liberty, either by dynastic intrigue or military violence; and they are firmly of opinion that no nation can be governed by brute force either with happiness to the subject or profit to the sovereign. In other words, they are for self-government and non-intervention; and the vast majority of the English public, even many of those who differ from them on other points, steadfastly support their policy.

Another remarkable proof of the root taken by foreign politics in the minds of Englishmen is the fact that the people, at any rate in their avowed convictions, are ahead of their statesmen, and instead of following passively in the wake of authority, judge of continental affairs for themselves. This was so in reference to Italian independence, which was advocated by thinking men, and had become a popular idea, before it was heartily supported by any prominent statesman, with the exception, perhaps, of Mr. Gladstone. It is even now the case with Hungary, a country which has not yet received justice at the hands of our leading politicians, but in whose cause the sure instincts of the people have long since declared themselves. It was the misfortune of the Hungarians that thirteen years since they were compelled to wage a sanguinary conflict for their constitutional rights under peculiarly difficult circumstances, and at a time when the merits of the controversy between themselves and the Emperor of Austria were very imperfectly understood. Driven to desperation by the overpowering forces that were brought to crush them, and by the apathy exhibited in England and France, they suffered themselves to be finally persuaded into violent measures, which injured an otherwise righteous cause, and in some degree blotted out the sympathy that was rising in their favour. But the terrible overthrow which befell Hungarian patriotism was not without its compensating results.

During the years of grinding oppression which followed the surrender of Georgey, party and local animosities were sunk in the one resolve to win back the ancient constitutional freedom of the land; while the emigrant soldiers and statesmen of Hungary spread everywhere the story of her wrongs, and roused a deep interest, especially in this country, in her future fortunes. Englishmen could not withhold their attention from a constitutional history which in so many respects resembled their own. They were surprised to find that in a country almost overlooked in their historical studies there had existed for at least six centuries institutions similar to those of England; a limited monarchy, a hereditary nobility, a house of representatives with the sole power of taxation, a system of local self-government more perfect, perhaps, than any other, and rights of personal freedom secured by immemorial usage. A country, too, in which religious liberty had been secured by a Catholic majority, and where free speech and writing, and a proud attachment to ancient franchises, had flourished for generations side by side with a chivalrous loyalty and a steady respect for law. It was impossible, we repeat, for Englishmen to withhold their sympathy from a nation who had inherited from old times recollections so strikingly akin to their own; as tales of Austrian oppression and lawlessness reached this country, the sympathy grew stronger; and when at length it was announced that a Hungarian Diet was again assembled, after the anarchical tyranny of twelve years' duration, and that the civil struggle for Hungarian rights had recommenced, the eyes of this country were turned with peculiar interest to the debates and other proceedings at Pesth. It was therefore with much disappointment that the coldness of our statesmen, whenever the name of Hungary was mentioned in either House of Parliament, was observed: yet it was hoped that the frigidity of their tone was forced on them by the necessities of State policy, and that in their hearts, like the rest of their countrymen, they were true to the traditions of constitutional independence. Much to the surprise of

many, and certainly to the regret of the distinguished body over which he presided, Lord Brougham at this juncture stepped out of his way to utter discouragement to Hungarian patriotism, by informing the Social Science Association at their Dublin meeting, that the Austrian Emperor had already restored to his Hungarian subjects their ancient constitution, and only refused to them the alterations which had been made in that constitution during the revolutionary period of 1848.

The statement was so erroneous that none acquainted with the facts of the case could be swayed by it for a moment; but it was felt at Pesth and elsewhere that words spoken by so illustrious a man on such an occasion might produce unfortunate misapprehension, not only in this country, but over the whole Continent; and the leaders of the constitutionalists in Hungary (embracing both parties in the Diet, and nine-tenths at least of the whole nation) accordingly resolved "to correct the impression which a statement so inconsistent with fact, from so high an authority, could not fail to produce upon many who might incline to take some interest in the controversy then pending between H. I. M. the Emperor of Austria and his Hungarian subjects. This object, it was thought by the most eminent members of both parties, could best be attained, not by an *ex parte* statement, but by placing without comment an English translation of the original documents—both the Addresses of the Diet and the Imperial-Royal Reply—in the hands of the Members of both Houses of the British Parliament."

The task of preparing this statement was entrusted to Mr. J. Horne Payne, whose knowledge of the Hungarian language and history peculiarly fitted him for the task. We are bound to say that he has executed his undertaking with ability and judgment, and placed before us, with explanatory notes, a series of documents which lucidly describe the attitude of the Hungarian Diet, and conclude the question as to the illegality of the Emperor's proceedings. The accuracy of the translation is vouched for by Baron Podmanicky, Vice-President of the



House of Representatives, and we heartily commend this brief volume, consisting of the imperial writ of summons for the Diet, the two addresses of that body, and other documents, to all interested in the most remarkable civil contest that has taken place since Hampden and Pym confronted the royal invader of our liberties.

For the benefit of those of our readers who may not have time or inclination for the perusal of these documents, we will endeavour to give a succinct account of the points at issue between the Emperor and the Diet; and in doing so we shall hope to refute the statement conveyed in the words of Lord Brougham. We allude to his Lordship with some reluctance, because we are thoroughly convinced that he has been misled by erroneous information, and that his heart is with freedom in Hungary as elsewhere; but as he has embodied in the sentence referred to what we fear is an opinion prevalent in some other quarters, we shall take his words as the proposition to be dealt with, and shall demonstrate, we trust, to the satisfaction of our readers, that the ancient constitution of Hungary has never been restored since 1849, and that the demands of the Diet are as legal and just, as the pretensions of the Emperor are unfounded.

By the laws of Hungary, then, the king cannot be crowned, and consequently cannot enter into the full enjoyment of even his limited prerogative, until he has taken the coronation oath, and issued the "diploma inaugurale." By the oath he undertakes to preserve intact the franchises and territories of the kingdom, and in the diploma he renews this promise in a more detailed form, and in language which is settled by the Diet. This oath is as old as 1222, when Andreas II. granted the "Aurea Bulla," the Magna Charta of Hungary, and its words have remained unaltered in substance to the present day. The only sovereign, prior to the present reign, who did not take the coronation oath, was Joseph II., who reigned despotically from 1780 to 1790, when he repented of his conduct, cancelled all the decrees he had issued, and made preparations for his

legal coronation, which was only prevented by his death. An Act was passed by the Diet in 1790, providing that the coronation must in future take place within six months of the accession.

But when the King of Hungary had been duly crowned, he did not thereby become possessed of any arbitrary power; he shared the power of legislation, as the sovereign of this country does, with the Parliament, which consists, as with us, of a house of hereditary nobles, and a house of elected representatives. He has never had the power to make or unmake a law, to raise a shilling by taxation, or to levy a recruit for the army;\* he could never legally supersede the established tribunals, nor imprison a subject save in due course of law.

These ancient franchises of the kingdom were solemnly reiterated in the famous document which is known as the Pragmatic Sanction. This compact between the House of Hapsburg and the Hungarian nation was made in 1723, when the Diet agreed to waive the Salic law of the country, and admit the female descendants of the reigning house to the throne, on certain specified conditions. They stipulated that Hungary should always remain an independent kingdom, subject only to its own laws, and that the king should observe the rights, liberties, and laws of the land, should take the coronation oath, and issue the inaugural diploma. Under this sacred compact the present Emperor of Austria, descended from the female line, claims the Crown of Hungary, and

\* "We will not now appeal to our older laws, which show, beyond dispute, that so long as taxes have been paid, since the first standing army was established, the granting of taxes and the raising of recruits have been the undoubted rights of the nation, which she has continuously exercised through her Diet. We refrain from recapitulating the detailed exposition in the text of the 8th Act of 1715, and the 19th Act of 1790, and will content ourselves with quoting the 4th Act of 1827, which declares that, 'as well the decreeing of all kinds of taxes, and other subsidies, in gold or in kind, as also the granting of recruits, belong to the province of the Diet to discuss and settle, and cannot, under any pretext, even in the most extraordinary case, be withdrawn from it; that the taxes granted by the Diet cannot be increased without its consent, nor any new tax imposed, nor recruits raised.'"—*Second Address of Diet of Hungary.*

by its terms, as an honourable man, and a lawful sovereign, he is unquestionably bound to abide.

The enactments passed by the Diet in 1848 did not alter any of the leading principles of the Hungarian constitution. They abolished the exclusive privileges of the nobles, did away with several oppressive imposts, and enlarged the electoral franchise; but we find from his Rescript to the Diet that the Emperor has given his express approval to these provisions,\* and only objects to those which concern the relations between Hungary Proper and Croatia, and those (but this point is not quite clear) which transferred some portions of the old local legislation to the jurisdiction of the Diet. By what figure of speech can it then be said that the ancient constitution of Hungary has been restored? Up to the present moment the Emperor has never been crowned as King of Hungary, has never taken his coronation oath, or issued his diploma; he has promulgated laws on his sole authority, has levied taxes without consent of the Diet, has superseded the common law courts by military tribunals, and has imprisoned his subjects by arbitrary power; at this moment illegal exactions are being wrung from the Hungarian people by the license of a soldiery; and every semblance of constitutional government is purposely set at nought. We do not colour the picture by dwelling on all the brutality and insolence which characterise the Austrian army in its unlawful occupation of the country; this, however insupportable to the unhappy victims of the wrong, is only an incident to the illegality—we simply ask whether such a state of things, such a mode of government, is the restoration of constitutional rule?

\* "We have, in our Diploma of the 20th of October, 1860, solemnly recognised as just, and confirmed the principles of the laws of 1848, by which the privileged position of single classes is abolished—the qualification to possess property and hold office extended to all—the obligations of the *Urbarium*, *Tithe*, and those of the subject class cancelled—the duty of aiding in supporting the burdens of the State, the liability to serve in the Army, declared to be common to all—and lastly, the right of suffrage extended to classes who before had not enjoyed it."—*Rescript of H. I. M. the Emperor of Austria.*

But it may be said, that if the Hungarians are now suffering the evils of absolute military sway they have no one but themselves to thank for it, since they refused to avail themselves of the offer made by the Emperor to send delegates to the General Council of the Empire at Vienna. The answer to this is short and simple: Hungary is an independent kingdom, possessing her own laws and institutions, which she has a right to retain until she relinquishes them of her own free will; she did not choose to give up the power of self-taxation and the advantage of national independence, in order to send, as was proposed, 85 members to a house of 343 representatives, of whom the majority would be elected by nationalities with interests diverse from her own. Nor is the question of the legal right of Hungary to abide by her own constitution in any way affected by the wisdom or folly of this refusal by her Diet. When there are two parties to a bargain it is open to either to decline the contract. A woman may be foolish to refuse an offer, but it does not follow that it is lawful to marry her by force. Naboth might have done well to accept the proffered terms for his vineyard, but Ahab was not therefore entitled to seize the land by violence. So in this case, the Emperor was entirely justified in asking the Hungarians to give up their constitution, and to fuse their national government in that of his other territories; but he was not justified, either as a politician or a gentleman, in turning on them with temper when they declined his overtures, in dissolving the Diet, and subjecting the whole land to tyranny and rapine.

This question of the union between Austria and Hungary is the point on which much of the controversy turns. The Diet maintain that the union is simply personal, like that between Sweden and Norway, the identity of the individual who wears the two crowns of Austria and Hungary being the sole connecting link. The Emperor on the other hand alleges that the union is real, the two countries forming one indivisible state. We are bound to say that the Emperor has the

worst of the argument, the documentary evidence, even that which he brings forward himself, being clearly against him. But even supposing that the union is somewhat closer than the Hungarians are willing at the present moment to admit, we cannot see how the Emperor's case is advanced thereby. Whatever union may exist between the crowns, it is indisputable that Hungary has from time immemorial possessed a Diet. Whatever construction the Emperor may put on the Pragmatic Sanction, this at least cannot be denied, that that famous instrument stipulates for the ancient privileges of Hungary, and that Maria Theresa and her successors acknowledged the obligation. On what possible pretext of morality or law does a Sovereign who, in his diploma summoning the Diet, relies on the Pragmatic Sanction for his title to the throne, violate the provisions of that compact by ruling without a Diet, and without legal tribunals? The Emperor is in the position of a man who claims an estate by his title-deeds, while he repudiates the covenants contained in them. It is a position which every English gentleman, if we except perhaps Mr. Roebuck, will consider at least equivocal.

We are able in this country to see the real question the more clearly inasmuch as our own history furnishes us with a case in point. Rather more than a century and a half ago England and Scotland were two separate kingdoms, united by the golden link of the crown, but each ruled independently by its own legislature and administration. A treaty of union was proposed, and after considerable negotiation, was assented to on both sides, to the great and lasting benefit of each nation. It will not be denied that the Scotch would have acted most unwisely if they had declined the bargain; but suppose they had done so—suppose that national pride, and ancient hostility, had prevailed over prudence and foresight—what then? Would the English Government have been therefore justified in marching an army over the border, dissolving the Parliament in Edinburgh, superseding the Court of Session by military tribunals, quartering soldiers on the

inhabitants to raise arbitrary taxes, and in fine, ruling the country by brute force? Yet, unless morality and law vary in their principles under different skies, the same damnatory verdict which every Englishman as readily as every Scotchman will pass on the bare idea of such lawless iniquity, must be recorded against the actual perpetrator of as foul a wrong—the throned anarchist who tramples on the legal rights of Hungary.

But we should not do justice to the Hungarian Diet, nor fulfil our purpose of laying before our readers convincing proof of the justice of their cause, if we did not quote some passages from the two remarkable addresses which, during their brief session of 1861, they sent up to the Emperor of Austria. In temper and dignity, in the calm eloquence which a sense of right inspires, in lucidity of statement, close reasoning, and thorough acquaintance with ancient precedents as well as the principles of law, these documents surpass anything of the kind that has been published since the days of the Grand Remonstrance. The civil heroes whose struggles and greatness have been brought before us so vividly by Mr. Forster, are equalled by Deak and other Hungarian patriots, in learning, firmness, and moderation. When it was apparent from the Diploma issued by the Emperor, and the speech of the Imperial Commissioner in opening the Diet, that the design was to deprive Hungary of her ancient right of self-government, it was determined to oppose a resolute resistance to the attempted usurpation. The more vehement party in the Diet were indeed anxious to deny the right of the Emperor to the crown of Hungary, as he had violated the law by postponing his coronation beyond the six months allowed by statute; but the moderate party, led by Deak, one of the most remarkable men in Europe, succeeded in carrying the address to his “Imperial Royal Majesty.” It commenced with an eloquent reference to the twelve years of oppression which the nation had endured, pointed out the many illegalities which still subsisted in the government, and then went on to show how impossible

it was for the Diet to assent to the plan announced in the Emperor's Diploma.

“ This Diploma would rob Hungary for ever of the ancient provisions of her constitution, which subject all questions concerning public taxation and the levying of troops, throughout their whole extent, solely to her own Diet; it would deprive the nation of the right of passing, in concurrence with the King, its own laws on subjects affecting the most important material interests of the land. All matters relating to money, credit, the military establishment, customs and commerce of Hungary—these essential questions of a political national existence—are placed under the control of a general Council of the Empire, a body the majority of whom would be foreigners. There these subjects would be discussed from other than Hungarian points of view, with regard to other than Hungarian interest. Nor is this all; in the field of Administration this Diploma makes the Hungarian Government dependent on the Austrian—on a Government which is not even responsible; and which, in the event of its becoming so, would render an account, not to Hungary, but to the Council of the Empire, which would give no guarantee for our interests, where they should come into collision with those of Austria.

“ Were this idea to be legalized, Hungary must cease both in legislation and administration to be independent; her most essential interests would be subject to the legislation and administration of the Austrian Empire; in a word, she would remain Hungary only in name, whilst in reality she would become an Austrian province.”

The address then sets out the nature and provisions of the Pragmatic Sanction, a “ bilateral, fundamental State-compact,” a “ Deed of Contract,” between the Crown and nation of Hungary, “ by which, on the one hand, our ancestors solemnly renounced, in favour of the female descendants of the House of Hapsburg, their rights to proceed to the free election of a king,” and “ on the other hand, Charles III., in consideration of the aforesaid surrender, covenanted for the fulfilment of the conditions for which the nation stipulated, namely, for the preservation of the independence of the country, of its rights, liberties, and laws.” The history of the dealing of subsequent sovereigns with Hungary is recited, and, among others, the Act of 1790, by which Leopold II:—

“ Acknowledged and declared that, ‘ although by virtue of the 1st and 2nd Acts of 1723, which extended the right of succession to



the female line, the crown of Hungary would always devolve on the sovereign who possessed, according to the established order of succession, the other Hereditary States; yet Hungary, with its annexed parts, was notwithstanding a free kingdom, in the entire administration of its laws independent; that it was therefore not subservient or dependent on any other empire or people, but possessed its own constitution and administration, and was to be governed not in the manner of the other provinces, but by its rightfully crowned king, in accordance with its own laws and customs.' "

The question of the nature of the union between Hungary and the Hereditary States of the Austrian Empire is argued with striking acuteness and research; the tie is shown to be strictly personal; and then the Diet, in the following paragraph, give their main reason, to us we confess conclusive, why it would be impossible for Hungary to consent to a fusion with Austria and to a common Parliament at Vienna:—

" At present the Hereditary States are members of the German Confederation. Towards it they have obligations to perform involving burdens to support; the decisions of the Confederate League have binding force on all the states belonging to the Confederation. On the other hand, Hungary is not a member of the German Confederation; the German interests, which the Austrian provinces are bound to protect and further, are for us foreign interests. The power of the Confederation, which, in the Austrian provinces, possesses, in some points, binding authority, is to us entirely foreign. Germany may carry on a war in its own interests, or its frontier may be attacked; Austria may be compelled to take part in such a war, and to join in defending the menaced frontier; but *their* war is not *our* war, *their* interests not *our* interests; they will not assist us in our battles, or aid us to repulse an attack on our frontier, for we are not members of the Confederation. Is it possible that countries politically so differently situated should be connected more closely than by a personal union? What surety should we possess that in a Council of the Empire, whose overwhelming majority is bound to the German Confederation, in accordance with the essential principles of the League,—that, in such a council, where our interests were not identical with those of the Confederation, our rights would be respected, and our interests spared? A closer union would place us under the control of an Austrian majority, it would make us dependent on an entirely foreign policy,—that of the German League, whilst we could claim no corresponding services in return.



Having adduced the instance of Sweden and Norway subsisting side by side in amity, but by a simple personal union, and having expressed their loyal desire to share equitably the burdens of the empire, even in this respect "to go beyond what strict legal obligation would require," the Diet thus firmly repudiate consent to any sacrifice of national independence :—

"We therefore hold it necessary solemnly to declare that we can sacrifice to no considerations and to no interests of whatsoever kind the constitutional and legal independence of our land, which has been guaranteed to us by a fundamental State-compact, by statutes, by royal inaugural diplomas, and by coronation oaths, that we shall cling to it as the essential condition of our national existence. Hence, we cannot consent to the withdrawal from the province of the Hungarian Diet of the right to decide all and every matter concerning public taxation, and the raising of military forces. As we entertain no wish to exercise the right of legislation over any other country, so we can divide with none but the King the right of legislation over Hungary; we can make the Government and Administration of Hungary depend on none other than its King, and cannot unite the same with the Government of any other lands; therefore we declare that we will take part neither in the Council of the Empire, nor in any other assembly whatsoever of the representatives of the Empire; and further, that we cannot recognise the right of the said Council of the Empire to legislate on the affairs of Hungary, and are only prepared to enter on special occasions into deliberation with the constitutional peoples of the Hereditary States as one independent nation with another."

The Diet proceed to complain of the non-completion of their members, the writs having been withheld from the annexed provinces of Hungary, such as Transylvania, Croatia, Slavonia, a course directly in contravention of the ancient constitution, and opposed to the express duties of the Crown; and they record their resolution not to pass any laws, or negotiate for the coronation, until their body has been made complete. They also point out the continued suspension of some of the fundamental laws of the constitution; "we have no parliamentary government, no responsible ministry. Our laws regulating the press, and the trial by jury in connexion with it, have not been restored. In opposition to distinct enact-

ments, direct taxes have been imposed, without the intervention of the Diet, by arbitrary power"; while, as if to demonstrate that the advances of the Emperor were insincere, a decree had just been issued, as they show, for the collection of illegal taxes by military force. And this was what has been termed a "restoration of the ancient constitution"! Most truly do the Diet say:—

"A parliamentary Government, a responsible ministry, freedom of the press, with its concomitant trial by jury, and the right of self-taxation, are the strongest guarantees of constitutional liberty. Our sanctioned laws have given us these guarantees, and never shall we consent to their abrogation or curtailment, however modified; we shall always regard a temporary suspension of these laws as a suspension of the constitution—as a denial of the constitutional principle itself.

After stating, in remarkable contrast to the blustering tone of disregard to moral obligation adopted by Austrian statesmen, that "neither might nor power is the end of government; might is only the means, the end is the happiness of the people," the Diet proceed, in the following words, to summarise the representations which they thought necessary to lay before the Emperor.

"The King of Hungary becomes only by virtue of the act of coronation legal King of Hungary; but the coronation is coupled with certain conditions prescribed by law, the previous fulfilment of which is indispensably necessary. The maintenance of our constitutional independence and of the territorial and political integrity of the country inviolate, the completion of the Diet, the complete restoration of our fundamental laws, the reinstitution of our parliamentary Government and our responsible ministry, and the setting aside of all the still surviving consequences of the absolute system, are the preliminary conditions which must be carried into effect, before deliberation and reconciliation are possible."

We have not space for more than a very cursory review of the Imperial Rescript in reply to this remarkable address, and of the second address by the Diet in way of rejoinder. The Rescript attempts to show that the functions of the Hungarian

Diet had always been limited as to taxation, and that the union between Hungary and the Hereditary States was real and not personal. The chief arguments relied on for the latter position are the unity of the army, the fact that Hungary has never had a separate ministry of foreign affairs, and the Act of 1741, by which the husband of Maria Theresa was made guardian of the heir in event of a minority instead of the Palatine of Hungary. To these three arguments it is replied in the second address, that though Hungarian regiments have fought side by side with Austrian soldiers in the wars of the Empire, yet the number of troops and the mode of levying and providing for them was always regulated by the Diet, and an Act of as late as 1840 is quoted on this point:—"Whereas in accordance with the demand of the Estates, based on the law, reports have been, in the name of His Majesty, laid before them of the position of foreign affairs, and of the present state of the Hungarian regiments, in consequence of these reports, and in consideration of these exigencies, the Estates grant, as subsidies, to meet the said requirements, of their own free-will and accord, and without prejudice, 38,000 recruits, under the following conditions." If this, and such as this, be the documents on which the Emperor relies for proofs of his right to raise armies in Hungary without leave of the Diet, he is certainly in evil case.

With respect to foreign affairs, the Diet reply that they have always been satisfied to leave them in the hands of the sovereign, as King of Hungary, whose ancient prerogative it is to transact them, subject to the general control of his Parliament; but they point out several statutes to show that the foreign interests of Hungary have never been merged in those of Austria; and as to the guardianship of a minor heir to the Crown, they completely turn the tables on the Emperor in the following sentences:—

"If the Constitutional Independence of Hungary were not clearly expressed in the Pragmatic Sanction and other laws, this said 4th Act of 1741, in the Rescript referred to, would alone

establish it beyond all doubt. For the Estates of the land chose the Consort of Her Majesty, Francis Duke of Lorraine, Barri, and Hetruria—who had not yet been elected Roman Emperor—co-regent with her most gracious Majesty, and entrusted him with the guardianship of the heir to the Throne, in the event of his minority. But they explicitly declared that this ‘election took place of their own free-will and accord, and that no Royal Consort should be entitled to found claims upon this Act as a precedent.’ They further provided that, during the co-regency, the inseparability and hereditary right of succession as by the 1st and 2nd Acts of 1723 established, should be unprejudiced; that the laws and privileges of the country should be maintained; that the office of Palatine should not be shorn of any of its prerogatives; that the affairs of the country should be administered in accordance with the laws; and that His Majesty, the co-regent, should not exercise the highest Royal functions, nor the *jura majestatica*, which, according to the laws, belong only to the crowned Kings.

“If Hungary had possessed no Constitutional Independence, if, according to the laws, the right of guardianship of the infant Hungarian King had not devolved on the Palatine, then it would have been unnecessary to pass this Act, seeing that to the father belongs the right of guardianship naturally, as well as by the laws of the Hereditary States. But just because the political position of Hungary is entirely different from that of the Hereditary States,—just because there existed no real union, it was necessary to pass a separate law, that with reference to Hungary the father might not be deprived of the right of guardianship of his own son.”

The answer as to the alleged restriction of the financial powers of the Diet is equally satisfactory, but for this and other arguments we must refer our readers to the Addresses themselves. We cannot pass by, however, the extraordinary declaration of the Emperor which brought the affairs between himself and the Diet to a crisis. Unable to deny the nature and extent of his obligations to Hungary, and feeling himself, probably, defeated by the Diet in logic and in statement of fact, he had recourse to the expedient of repudiating the terms to which his predecessors had assented, on the ground that he is “*not personally pledged*” to the laws he is violating; in other words, that a sovereign who inherits a crown has a right to set aside all previous statutes and contracts which he finds inconvenient to himself! The Queen of England, by this reasoning,

may repudiate the terms of the Act of Settlement, as it was passed more than a century before her birth; or if inclined to revise the Reform Act, she may declare herself "not personally pledged" to a measure enacted under her immediate predecessor. This last, indeed, is a case precisely in point, since the Emperor claims to cancel the Acts of 1848 (or rather such of them as are opposed to his own ideas) because they were passed in a period of excitement, and assented to only by his uncle. Well do the Diet say in reply to this audacious dishonesty :—

"If the sovereign has the right not to consider personally binding on himself the laws sanctioned by his predecessors, what guarantee have we for our constitution, for our legal liberty, for laws created and to be created; on what are the peoples of the Empire, on whom your Majesty has bestowed constitutional liberty, to rely? Every successor of your Majesty can declare that he does not think this or that constitution, which his predecessor has sanctioned, compatible with the interests of the Empire, or with its position as a great power, and does not consider it binding for his person. If we cancel from the constitution that continuity of obligation which passes from generation to generation, and binds as much the sovereign as his peoples; every constitution, the safety of every state, becomes the plaything of circumstances. This continuity is the basis of the liberty of the people and of the throne, of the sovereign, and of his hereditary right of succession. The denial of that continuity annihilates that interposing power, without which, on a collision of interests, every question must be decided by arbitrary force, or by the edge of the sword, without which peoples and their princes would have no other choice but Absolute Government or Revolution. This salutary mediating power is confidence and belief in the durability of right, which cannot even be conceived apart from continuity of obligation."

We are not surprised that after this avowal of faithlessness on the part of the Emperor the Diet spoke of "the thread of negotiation as broken off," and re-insisted in firm, though perfectly temperate language, on their constitutional rights. Francis Joseph, with some good qualities, and some materials for a higher character, seems to be afflicted with the same mental peculiarities as brought so much calamity on our own unhappy Charles. Like Charles he has no idea of the honour-

able fulfilment of reciprocal obligations between a sovereign and his people. Like Charles, he inspires with profound distrust those who have to negotiate with him on national affairs. Like Charles, too, he exhibits a petulance when thwarted, and an impatience of sound advice, which prove his mind to be destitute of the true capacities for a ruler. The Diet, therefore, after once more recounting the legal rights of their country, and the oppressions which it now endures, concluded with a solemn declaration that they held fast to the Pragmatic Sanction, and to all the conditions contained in it, without any exception, and that they must refuse to "regard or recognise as constitutional anything which is in contradiction to any part of it." And after categorically refusing to accept the Imperial Diploma, or to send representatives to the Austrian Council; after declaring that all Acts passed, obligations incurred, or loans contracted by that Council, were invalid as respects Hungary; after further declaring that they will not surrender their lawful right to vote supplies, to regulate taxes and military levies, and to constitute with the Sovereign the Legislature of Hungary,—that they are "compelled to regard the present administration of the country, especially the despotic conduct of unconstitutional officials, as illegal, and subject to punishment according to the laws," they finally conclude in a sentence which, for the eloquence of dignity and patriotism, may match with anything of ancient or modern times:—

"It is possible that over our country will again pass hard times; we cannot avert them at the sacrifice of our duties as citizens. The constitutional freedom of the land is not our possession in such a sense that we can freely deal with it; the nation has with faith entrusted it to our keeping, and we are answerable to our country and to our conscience. If it be necessary to suffer, the nation will submit to suffering, in order to preserve and hand down to future generations that Constitutional Liberty it has inherited from its forefathers. It will suffer without losing courage, as its ancestors have endured and suffered, to be able to defend the rights of the country: for what might and power take away, time and favourable circumstances may restore; but the

recovery of what a nation renounces of its own accord, from fear of suffering, is matter of difficulty and uncertainty. The nation will suffer, hoping for a better future, and trusting to the justice of its cause."

The Emperor, probably convinced that this second Address was unanswerable, at once dissolved the Diet. He has since ruled Hungary by force in admitted violation of the law.

We have dwelt on this history, because the vivid interest of Englishmen in foreign politics, on which we observed at the commencement of the article, will cause our readers to appreciate every turn of the conflict. We cannot doubt of the opinion with which any impartial man, conversant in any degree with constitutional law, will rise from a perusal of the foregoing pages, and still more from that of the documents on which our remarks have been founded.

Baron Podmanicky, in a short letter addressed to Mr. Horne Payne, which will be found at the commencement of his volume, says that, "if there is one country in Europe whose opinion is valued by us, it is England."

The Baron, and every Hungarian patriot, may rest well assured that whatever mistaken words may have fallen from a distinguished man, or whatever may be insinuated to the contrary by supple politicians or railway negotiators, the people of England are true to the great principles of constitutional freedom, of which they know the value themselves, and desire to see triumphant in Hungary as elsewhere in Europe. Nor let the Emperor or his Austrian statesmen delude themselves with the belief that the public opinion of this country, which controls any ministry, will suffer an active alliance with a Government which contemns moral obligation, and outrages law and justice. The system at present maintained in Hungary is in truth an anarchy; and the ruler who at this time, and with the political prospect before us, perpetuates anarchy, is the public enemy of Europe.

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# POSTSCRIPT.—THE SAVIGNY FOUNDATION.

**WE** have been requested to make known to the legal profession of the United Kingdom that an effort is now being made in Germany, having its centre at Berlin, to found an institution in memory of the illustrious Savigny. The contemplated foundation is intended to encourage the study of Comparative Jurisprudence, by giving prizes for essays on the subject, and establishing scholarships, both of which, as we understand, will be open to all countries. The object, therefore, not only commends itself to all the admirers of the great jurist in whose honour the institution is to be erected, all readers of his profound and varied works, but also to those who are interested in the prosecution of that comparative study of the different systems of jurisprudence existing in the world, on which the true science of law must be built. We understand that the Crown Princess of Prussia, our own Princess Royal, with that intelligent sympathy in all objects of public utility which may be expected from any child of Her gracious Majesty and the Prince Consort, has shown a warm interest in the undertaking, and that it is at the suggestion of Her Royal Highness that an appeal is likely to be made to the Bars of the United Kingdom, and other members of the legal profession, in aid of the Savigny Foundation. Among the contributors to the fund, in addition to the Princess Royal, we observe the names of the Kings of Prussia, Portugal, and Wurtemberg, of the Chamber of Advocates at Paris, the University of Giessen, and many others. The sum already subscribed amounts to nearly £800. We understand that Sir Erskine Perry, the learned translator of Savigny's *Treatise on Possession*, and other students of his works, are desirous of uniting in an effort to form a corresponding committee in this country in aid of the Savigny Foundation. We heartily commend the undertaking to the liberal consideration of our readers; and we may add, that any inquiry on the subject addressed to the Editor of this Magazine, at our publishers, will receive immediate attention.



## Notices of New Books.

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[\*.\* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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**The Magisterial Synopsis. A Practical Guide for Magistrates, Clerks, Attorneys, and Constables: Summary Convictions, Indictable Offences, with their Penalties, Punishments, Procedure, &c., being Alphabetically and Tabularly arranged. By G. C. Oke, Assistant Clerk to the Lord Mayor, Author of "Magisterial Formulist," "A Handybook of the Game and Fishery Laws." Eighth Edition. London: Butterworths.**

THIS Book is not a manual, but a comprehensive and exhaustive synopsis of the Statute and Common Law administered by the magistracy; forming a large volume of upwards of twelve hundred pages. Justices of the Peace will find in this work, taken with its companion the "Formulist," by the same author, every necessary information for the discharge of their ministerial and judicial offices. Having officiated as Assistant Clerk to the Magistrates' Bench for a long period, and latterly at the principal Metropolitan Court, Mr. Oke has brought to the exposition of this department of law, a practical familiarity with the course of procedure, and a special, it may be said, esoteric knowledge of the magistrate's official difficulties. Each edition has gone on increasing in popularity as well as in bulk: the new statutes and more recent learning being grafted on from time to time, and in harmonious order incorporated with the original. The author has not been guilty of the common indiscretion which affects recondite learning in the attempt to compile a useful work of practice. Following a natural method, he never allows himself to forget that the Synopsis is intended to lie on the magistrate's table for reference and consultation. The design of the work was first suggested to the author "by the inconvenience which justices and their clerks experience generally, but more especially when called upon suddenly to act, and in the bustle of a Petty Sessions, from the want of some book of reference in which may be found, succinctly and at a glance, the legal requirements of the numerous enactments respecting each offence punishable summarily." The division of the work into three parts, with the subdivisional chapters of each, very much facilitate the process of reference. The first part relates to summary convictions, the second to indictable offences, and the third to special and petty sessions

matters. It is impossible to speak in terms too laudatory of the patience and discrimination bestowed on the syllabus of these offences under each section which are arranged alphabetically. At one view information is given in contiguous columns as to the offence, the statute under which it is made punishable, the time of laying the information, the number of justices necessary to constitute a court of competent jurisdiction, the penalty to be inflicted and the mode of enforcing it, to whom the penalty is payable, and in what cases and during what time it is competent to appeal. The accuracy and completeness of the information compiled, as well as the perspicuous method happily conceived, and scrupulously observed, in the arrangement of that information, are recommendations sufficiently powerful to sustain, and probably to augment, its popularity.

The unwieldy size of this volume is perhaps its greatest fault, and for that the Legislature, and not the author, is responsible. There is a point in the condensation of law beyond which the severest and most judicious pressure can effect no diminution without mutilating the substance itself. Mr. Oke has, with considerable success, extracted the pith of judicial decisions and Acts of Parliament, but with all the author's ingenuity, the work has grown under his hands from the 410 pages of the first edition in 1848, to the present awkward bulk of 1,206 pages. Year after year new statutes are passed, conferring new jurisdiction, or enlarging the powers already wielded under the old. The author feels a natural solicitude regarding the ultimate results of this system of legislation, a system which has already produced a vast number of enactments "*tam immensus aliarum super alias acervatarum legum cumulus*." Mr. Oke maintains the "urgent necessity for a uniform and comprehensive code of magisterial procedure being provided by Parliament before further matters of jurisdiction are conferred on the Petty Sessions." "When such a measure becomes law, this work would probably be reduced in size; for it is now encumbered by needless repetitions and a variety of procedure provisions in the present statute law, which a general Act could remove, and at the same time materially facilitate the duties of those who, for the most part, gratuitously have to administer this extensive branch of the law."

**A Manual of Practice in the Office of Land Registry.** By Henry Gough. London: V. & R. Stevens, Sons, & Haynes.

THIS Manual includes the Acts to facilitate the proof of title to, and the conveyance of, real estates, and for obtaining a declaration of title (25 & 26 Vict., cc. 53, 67); and also the general rules and orders of the registry, forms of proceedings, and tables of fees. It is intended for a practical guide to those whose professional duties may require them to take part in any proceedings under the new statute "For the Proof of Title to, and the Conveyance of, Real Estates." The author has spared no pains to render it as complete as possible, but he observes in his preface that faults must be incidental to the

first draft of a treatise on an extensive legislative scheme which has yet to be reduced to practice. "When this shall have been so far effected as to supply the means of enlargement and correction, the author hopes to offer to the profession an enlarged and improved edition." He further observes, "It cannot be expected that all the details of a system so new and so untried will be completely settled from the very first. But with the hearty good-will and co-operation of all who may be called to participate in working out this great experiment, there can be no doubt that the practice may very soon become simple, certain, and harmonious." A short introduction gives a review of the Irish system in the Landed Estates Court, and of the leading features in the Acts of Lord Westbury and Lord Cranworth.

**A Manual of Common Law and Bankruptcy**, founded on various Text-Books and recent Statutes, and designed as a Companion to Smith's Manual of Equity. By Josiah W. Smith, B.C.L. London: V. & R. Stevens, Sons, & Haynes, Bell Yard, Lincoln's Inn.

THIS book is written on the same plan as the Manual of Equity by the same author, and is founded, he tells us in the preface, on about sixty text-books, to which references are duly made. It is intended to serve the purpose of a first book for students in Common Law and Bankruptcy, and the author advises his readers to pass on from his pages to those of Brown's Commentaries, Addison's Contracts and Torts, John William Smith on Leading Cases and Contracts, Stephen's Commentaries, and Best on Evidence. As an introduction to these standard works, we think that Mr. Smith's Manual may prove useful, and we would even go further, and believe that the practitioner and the legislator may occasionally find instruction in its pages. The great difficulty in all such works is that they have an inevitable tendency either to run into a dry recital of points, or to degenerate into a loose, superficial statement. As far as we are able to judge, Mr. Smith has to a great degree avoided both these errors, and we quite believe him when he says that "great has been the expenditure of time and thought in selecting, arranging, digesting, compressing, defining, distinguishing, and qualifying, which the preparation of it has involved." The least satisfactory part of the work is that relating to Bankruptcy, which is really nothing more than a brief (but we are bound to say very careful) compendium of the statute law on the subject. This is hardly a chapter for a strictly elementary manual; the first days of a student are not to be occupied with the details of registrar's duties, and County Court jurisdiction; it should rather be the object of an instructor at this stage to give a just survey of the principles and objects of law, and in this respect the work, as a whole, is not deficient.

**Papers read before the Juridical Society. Vol. II., Part V. London : Wm. Maxwell. 1862.**

THE Fifth number of the Juridical Society Papers consists of half a dozen articles, written with the care, originality, and learning, which usually distinguish the contributions of that learned society to the Science of Jurisprudence. Some of them are speculative in their character, but the majority are directed towards immediate practical results. The dissertation by Mr. Edward Webster, which has also been published in a separate pamphlet, on Promotion at the English Bar, will probably attract more attention than it has hitherto done. Unfortunately, the author conceives himself to be the victim of the system which he undertakes to denounce, and by the injudicious intrusion of personal matters, provokes the suspicion that the well-pointed shafts hurled against the existing evil have been deeply dipped in the gall of bitterness. There is no valid reason, however, why those who in actual experience have been forced to suffer a wrong, may not be the best qualified expounders of its cause. This, like every other question deserving of serious thought, should be considered dispassionately, and without reference to individual circumstances. Mr. Webster, after tracing to its origin the division of the Bar into the Inner and Outer Bar, contends that the power now vested in the Lord Chancellor of conferring the rank of Queen's Counsel and Serjeants-at-Law, operates unjustly towards the Bar, is prejudicial to the interests of suitors, and encourages political corruption. He proposes that "standing" alone should be a sufficient qualification to entitle counsel to take leading business and to obtain a seat within the bar. For the encouragement of healthy emulation, it is suggested that a new order be established of a purely honorary character, and giving no monopoly of business, to be called "The Crown's Order of Learning." Men distinguished for their professional ability are to be invested with this order, and shall have the privilege of wearing a distinguishing robe in court. The whole reasoning is grounded upon the supposition that forensic honours are now unwisely, if not unjustly, bestowed. It is evident that if merit be duly rewarded, the public good will not suffer by consigning mediocrity to the back benches.

There are two papers in the number upon kindred subjects, viz., on Codification. Mr. Marshall's paper is confined to the written law, while in the other, the author, Mr. Sweet, discusses the expediency of digesting the precedents of the common law, and regulating the publication of Reports. The two papers on International Law are very different in character : both highly meritorious. Professor Katchenowsky has visited many countries of Europe with the sole purpose of studying the great questions of International Jurisprudence. The substance of the paper, read in the author's absence before the Juridical Society, consists of the facts collected during those travels, with the conclusions deduced from them, and is a highly valuable contribution towards rightly understanding the present state of international jurisprudence. Mr. Clarke composed

his paper immediately after the affair of the *Trent*, and has, with great success, brought together the leading cases upon that subject. The new Land Transfer Acts have diminished for the present the interest which for some years has been taken by statesmen and lawyers in the alienation of, and title to, real property. Mr. Wolstenholme's scheme for the simplification of title to land has the merit of being ingenious. The whole is constructed on this somewhat startling and fundamental principle; that after a certain date no person entitled to the legal fee simple shall be allowed to make any disposition thereof except to the extent of the whole fee or for a term of years absolute. Thus at one stroke nearly the whole of the law of uses, of contingent remainders, and the doctrine of powers, would be abolished and swept to oblivion. However inferior the Lord Chancellor's Land Transfer Act may be in point of daring, and whether it may turn out a failure or not, either alternative will leave the country in a safer position than if an experiment had been made on Mr. Wolstenholme's visionary project.

**An Essay on the Principles of Circumstantial Evidence; Illustrated by numerous Cases.** By the late William Wills, Esq. Edited by his son, Alfred Wills, Esq., Barrister-at-Law. Fourth Edition. London: Butterworths. 1862.

It seems that Mr. Wills, during the ten years which had elapsed between the publication of the third edition of this interesting work and his death, had been constantly collecting cases illustrative of the subject. These have been inserted in the present edition, and a new section, on Scientific Testimony, has been added. Mr. Alfred Wills has finally prepared the volume for the press, and says that he appends his name "only because I think my father would have wished that some one should appear to be responsible for even these mechanical operations." It would be utterly impossible for us in a brief notice to do justice to the work; but we may perhaps recur to it in a subsequent number and in another part of our pages.

**The Divorce and Matrimonial Causes Acts, with the Rules and Orders, Notes and Forms.** By F. A. Inderwick, Esq., of the Inner Temple, Barrister-at-Law. London: William Maxwell; H. Sweet; V. & R. Stevens. 1862.

THIS Volume consists of a table of cases; a list of statutes relating to marriage; the Divorce and Legitimacy Acts at length, with notes of cases, and short remarks on the sections; the Rules, Orders, and Regulations, and tables of fees. There is also the table of prohibited degrees of consanguinity, and an index. The preface, which has a short, but not badly executed historical sketch of the Marriage law in England, commences with telling the old tale of Mr. Justice Maule's address to a prisoner convicted of bigamy. Why is the judge's name suppressed? and why is not the terse and vigorous language used on the

occasion more accurately reproduced? We are bound to say that this is the only fault we have to find with Mr. Inderwick's book.

**The Law Relating to Juvenile Offenders, Reformatory and Industrial Schools, with practical suggestions in reference to the commitment of Children to Reformatory Schools.** By T. C. Sneyd Kynnersley, Esq., Police Magistrate, Birmingham. London: Shaw & Sons, Fetter Lane.

THE Author of this book is anxious that it should be understood that it is not intended to instruct magistrates or their clerks in the discharge of their duties, the Juvenile Offenders Act having been in operation since 1847, and acted upon daily without any difficulty. It is intended for general use, and to furnish those who take an interest in the treatment of criminal destitute and neglected children with a collection of the statutes relating to juvenile offenders, and a simple statement of the mode in which the law is administered. Mr. Kynnersley's suggestions are very valuable, and, with the list of certified schools included in the book, will be found most useful to magistrates as well as to the benevolent public for whom the work is intended.

**The Statutes, General Orders and Regulations, relating to the Practice, Pleading, and Jurisdiction of the Court of Chancery; with copious notes containing a summary of every reported decision thereon.** By George Osborne Morgan, M.A., of Lincoln's Inn, Barrister-at-Law. Third Edition. London: V. & R. Stevens, Sons, & Haynes. 1862.

THERE are two methods upon which legal treatises may be written. The first, the most ancient as well as the most philosophical, is the least favoured by cotemporary publishers. The second imposes a heavier task on the assiduity than upon the originality of the author, and without affecting greatness or profundity accomplishes much that is practically useful. Earlier jurists in their learned commentaries and disquisitions sought to elaborate from broad principles of law, illustrated by judicial decisions and statutory enactments, exhaustive treatises having logical completeness and unity of character. They represent the hard labour of years, and have been written, not for hasty reference, or hand to mouth information, but for the thoughtful perusal of arduous legists pursuing their *viginti annorum lucubrationes*. Nor can it be denied that there are illustrious examples of this method in the works of several authors now living. They constitute the classics of legal literature. Judging from the more recent publications, however, it would seem that there is a decided tendency to discard Institutes and systematic Commentaries for ephemeral treatises, which are generally known as books of practice. Profound learning and sustained ratiocination may contribute



material assistance towards building up a philosophical system of jurisprudence, but the law of supply and demand is imperious and inexorable, and for the present, at all events, that law exacts useful, simple, and complete practical text-books. Mr. Morgan's work is professedly of this class, and merits the highest commendation for its usefulness, simplicity, and completeness. This is an excellent example of the more recent and popular method. In order to explain the pleading, practice, and jurisdiction of the Court of Chancery, all the cognate statutes are collected and arranged in regular chronological order, beginning with the 2 & 3 Vict., c. 54, and descending through the series to the 23 & 24 Vict., c. 149. A separate chapter is devoted to the exposition of each Act. Appended to the several clauses are the explanatory decisions of the Bench, in the selection of which the author has shown much discrimination and sound judgment. Considering that the Acts and Orders which constitute the framework of the volume have already elicited somewhere about twelve hundred reported decisions, the profession must feel indebted to Mr. Morgan for obviating the necessity of "noting up" the cases, by the complete and pithy analysis of such as are of principal importance. In the present state of the practice and procedure of the Equity Courts a compendious handbook of this nature is an absolute necessity. When the rules of the Court had to be extracted from the tomes of Vernon or the manuscript notes of Lord Nottingham, such text-books as Maddock, and the older editions of Daniell, were not only useful but indispensable. "But now that, thanks to the energy of the Legislature and the Judges, nine-tenths of the whole practice can be summed up in six hundred small octavo pages, it may not unreasonably be hoped that the method adopted in this volume possesses at least as much to recommend it as that of the more elaborate but more cumbrous treatises of modern days." The practitioner will find in the pages of this book ample and at the same time terse and business-like information upon almost all the questions that arise in the ordinary proceedings in Chancery. The later and more important cases are cited not only from the standard reports, but from those of the *Law Journal*, the *Jurist*, the *Weekly Reporter*, the *Law Times*, and *Equity Reports*. In the present edition the chapters on the following subjects have been revised and enlarged, viz., on Demurrers and Pleas, on Receivers and Injunctions, on Motions and Petitions, &c. &c. The volume is divided into two almost equal parts, the first being devoted exclusively to analytic comments upon the several statutes, and the latter to the enumeration and exposition of the Consolidated General Orders of the Court of Chancery. The substance of the notes as well as of the text is abbreviated in the margin, and the tables of the incorporated orders and regulations, as well as the general index, exhibit workmanlike completeness. The book does not assume to be a complete code of Chancery procedure, but is assuredly entitled to be received as a clear and accurate compendium of the New Practice, established by legislative enactment and illustrated by judicial authority.

**Papers and Discussions on Jurisprudence : Being the Transactions of the First Department of the National Association for the Promotion of Social Science, London Meeting, 1862. London : Butterworths, 7, Fleet Street, E.C.**

THE Transactions of the Social Science Association have hitherto been published in one octavo volume. The reputation of those volumes for the accuracy, and variety of the information communicated, having now been well established, the public are no doubt looking forward to the issue of the number for the present year with some interest. The last Congress, held in the Guildhall, when London was crowded with visitors, was attended by large audiences; and many will no doubt be glad to have reproduced in a permanent form, the information and impressions, which, by their swift succession, and on account of their very abundance, were too soon obliterated from the mind, or thrown into confusion. From the character of the papers which were read in Guildhall, and the discussions which followed, there can be little doubt that the popularity of the Transactions will be sustained, if not raised much higher. Embracing within its scope a great variety of subjects, it cannot be denied that to some readers many of these dissertations, however excellent in themselves, will have only a limited and subordinate interest. A plan has been adopted which will enable every reader to obtain the Transactions of either of the sections in a separate number. The papers which were read in the first section, on the "Principles of Jurisprudence and Legislation," have been published together in a pamphlet of convenient size, and will no doubt have a large circulation in the legal profession.

The essay "On the Importance of the Study of Jurisprudence," written with the subtilty and breadth of thought which characterises the author of the "Treatise on Evidence," forms a fitting introduction to those papers which profess to have a more practical object. The science of law is considered in this paper by Mr. Best under three divisions, viz., general, particular, and comparative. Devoted principally to the discussion of fundamental principles, the strictures upon the statute law of England, under the division of Particular Jurisprudence, are no less true than trenchant; and the gigantic evils in procedure and legislation are traced to a common cause, the neglect of the study of jurisprudence as a science.

Those who have turned their attention to the difficult questions involved in the theory of government by representatives, and to the able analysis of the same contained in Mr. Hare's "Treatise on the Election of Representatives," will be glad to find in a paper read at the Congress by the author a succinct account of the reception which his method has met with in different countries during the last three years. It would appear that in America, in the Australian colony, as well as on the European continent, the proposal to elect governing bodies by exhaustive majorities and unanimous quotas of the constituencies, has attracted many advocates. It is designed to



propose to the Council of the Canton of Geneva, the adoption of this method of election with a view to the proper representation of minorities in that assembly.

Mr. R. Denny Umlin's paper contains some very suggestive observations upon the "Conflict between the Laws of Ireland and England." The author contrasts the procedure in the Courts of Equity, the Court of Probate, the Court of Admiralty, the Courts Ecclesiastical, &c., and animadvert upon the embarrassing discrepancies in the laws of each country, maintaining that this conflict is not "a merely sentimental grievance, but a source of practical inconvenience to thousands."

It is anticipated that a determined, and we trust a successful, effort will be made in Parliament next session, to obtain the sanction of the Legislature to some scheme for the concentration of the courts and offices of Judicature. The paper read upon the subject by Mr. Thomas Webster, F.R.S., and the instructive discussion which followed, and over which Lord Brougham presided, may be consulted with advantage by those who desire information on the matter. We specially invite a perusal of Mr. Young's speech on account of the lucid and convincing statement it contains respecting the financial bearings of the project, upon which alone was grounded the opposition of the House of Commons to the bill of last year.

Mr. G. C. Oke, in a paper on "Magisterial Procedure," comments upon the extensive summary jurisdiction exercised by the magistracy in England—whether as police, stipendiary, or unpaid justices—in the numerous petty sessions and police courts; and points out the defects and diversities existing in the present practice.

The historical survey of the Marriage Laws of England and Ireland by Mr. Montague H. Cookson, D.C.L., is not the least interesting or valuable paper of the series. Within a small compass the author has succeeded in presenting an outline of the transitions through which the respective matrimonial laws of England and Ireland have passed, as well as cogent reasons in favour of their assimilation in several particulars. The antiquities and the inconsistencies of the Irish Law of Marriage are pointed out, and the disastrous results inevitably consequent upon clandestine marriage, are unsparingly exposed and severely criticised in this as well as in the complementary paper "On the Marriage Law of Scotland," by Mr. G. Harry Palmer. It is understood that the Committee of the Law Amendment Society have prepared a Report on the Marriage Laws of the United Kingdom, and that the subject will be considered at a general meeting of that Society early next session.

The Papers by Mr. A. Pulling, on "Private Bill Legislation;" by Mr. Vernon Lushington, on "The Law of Master and Servant;" by Mr. T. Hare, Inspector of Charities, on "The Law of Charitable Trusts," &c., will be found to contain not only reliable information, but original suggestions well worthy of consideration. To the series of papers is added by way of supplement a concise summary of the discussions which took place both at Burlington House and in the Guildhall.

## Events of the Quarter.

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PARLIAMENT was prorogued by Royal Commission on the 7th of August. The session is spoken of, we observe, as one in which little work was accomplished; yet it was fertile in measures of interest to the legal profession. The Highways Act, the Joint Stock Companies Act, the Chancery and Lunacy Regulation Acts, will alone furnish a respectable addition to the statute-book. And in addition to these are the Transfer of Land and Declaration of Title Acts, destined, if successful, to commence a revolution in the practice of conveyancing. Will they be successful? Judging by the general tone of opinion, we should answer—No. But in reality any opinion is at present premature. The Chancellor is clearly determined that if his Act is a failure it shall not lie with him; he has made an appointment of Registrar, in Mr. Follett, Q.C., which commands the applause of the whole profession, and we believe that active exertions have been, and are being made, to bring the office into good working order. It was opened on the 15th of last month, at 34, Lincoln's Inn Fields, the *habitat* of the departed Insolvent Debtors' Court, which was recently swept out of existence by another great measure of the energetic Chancellor.

WE ought to note, too, that under the Bankruptcy Act just alluded to, the Queen's Prison has ceased to be. The debtors have been all removed to Whitecross Street. The time-honoured institution of imprisonment for debt is passing away under our eyes.

IN a little matter which has made some stir, Lord Westbury has not been so happy. A Mr. Jones, of Clytha in Monmouthshire, has assumed the surname of Herbert in the place of his original designation, having previously taken the arms appertaining to his new name. Lord Llanover, the Lord Lieutenant of the county, refuses to recognise the change, and will not permit Mr. Herbert to qualify as magistrate under the new appellation. Lord Llanover, attacked in more than one quarter for his decision, laid the case, or rather *his* case, before the Lord Chancellor, and received a short reply, stating unreservedly that no man can change his name without royal license. The soundness of this opinion is much questioned, and whether it be sound or not, it should hardly have been given on an *ex parte* statement. It may be added that Lord Llanover and Mr. Herbert are relatives, and that the dispute has been carried on with all the peculiarities of tone which generally distinguish a family squabble.

HER MAJESTY and the Emperor of the French, in order to define within their respective dominions and possessions the position

of commercial, industrial, and financial companies and associations, constituted and authorized in conformity with the laws in force in either of the two countries, have concluded the following articles:—

I. The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorized in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals, whether for the purpose of bringing an action, or for defending the same throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions.

II. It is agreed that the stipulations of the preceding article shall apply as well to companies and associations constituted and authorized previously to the signature of the present convention, as to those which may subsequently be so constituted and authorized.

III. The present convention is concluded without limit as to duration. Either of the high powers shall however be at liberty to determine it by giving to the other a year's previous notice. The two high powers, moreover, reserve to themselves the power to introduce into the convention, by common consent, any modifications which experience may show to be desirable.

ALL our readers will be glad to know that a well deserved compliment has been paid to Mr. M. D. Hill, Q.C., Recorder of Birmingham. The town council have raised his salary from £300 to £400 a year in consideration of his "lengthened and distinguished services in the general administration of justice, and in the cause of criminal reform." We believe there was never a juster eulogy pronounced.

SIR JOHN D. HARDING, D.C.L., after holding the highly responsible and confidential office of Queen's Advocate, for ten years, has resigned, owing to failing health. Sir John Harding was appointed in 1852 by Lord Derby, as successor to Sir John Dodson, who succeeded to the judgeship of the Arches Court on the death of Sir Herbert Jenner Fust. Dr. Robert Phillimore is the new Queen's Advocate.

WE are glad to see that Mr. George Harris, well known in the profession and the literary world as the author of the "Life of Lord Hardwicke," and other works, has been appointed Registrar of the Court of Bankruptcy, at Manchester. The salary of the office, under the recent Act, is £1000 a year.

ON the 18th ult., Joseph Ormsby Radcliffe, Esq., LL.D., Q.C., expired at his residence in Dublin, after a short illness. Dr. Radcliffe discharged his onerous duties as Judge of the Consistorial Court with independence and ability, and was much respected by the profession. As Vicar General of the provinces of Armagh and Dublin he exhibited the same high qualities of mind, and will be

deeply regretted no less by all who came into contact with him in his public capacity than by his personal friends.

MR. CHARLES PEARSON, the eminent Solicitor to the Corporation of the City of London, died on the 14th of September, aged 69 years. Mr. Pearson was admitted an attorney in 1816. In the following year he was elected to the Common Council for the Ward of Bishopsgate, of which he soon rose to be a prominent member. In 1839 he was appointed City Solicitor, and in 1847 was returned to Parliament for the Borough of Lambeth, when he became one of the advocates of that reformation in the treatment of criminals which has been since to some extent carried out. Other offices of minor importance were held by Mr. Pearson, connected with the City of London. The Common Council have formally testified their gratitude for the many important benefits which Mr. Pearson was the instrument of conferring upon them.

THE *Upper Canada Law Journal*, referring to the recent appointments of Attorney and Solicitor-General of that Colony, says:—

“The new Attorney-General, the Hon. John Sandfield Macdonald, Q.C., has been for a long period in public life, being now the senior member of the House of Assembly. He received his legal education under the supervision of Chief Justices McLean and Draper, and was called to the bar in Trinity Term, 1840. In 1849, he received the honour of a silk gown, and was appointed Solicitor-General on the elevation of Mr. Solicitor-General Blake to the Chancellorship. He resigned that office in 1851, and the following year was elected Speaker of the Legislative Assembly. He also held his present office of Attorney-General for a short period in 1858. The present Solicitor-General, the Hon. Adam Wilson, Q.C., is comparatively new to political life. He was called to the bar in Trinity Term, 1839, and was for many years the law partner of the late Hon. Robert Baldwin. In 1850, during the administration of that distinguished politician, he, together with the present Chancellor, and Justices Richards and Hagarty, and others, received the patent of Queen’s Counsel. He has held the office of Mayor of the City of Toronto for some years, and has the reputation of being a careful, learned, and pains-taking lawyer.”

THE first Congress of the *International Association for the Social Sciences* (modelled on the English Association) was held at Brussels in the month of September. The meeting was highly successful, and the Association (which is to meet at Ghent next year) promises to be one of permanent utility on the Continent. All the officers were Belgians; but each nationality represented at the Congress was allowed to elect Vice-Presidents, Secretaries, &c., of its own, who enjoyed a corresponding honorary rank in the body at large and the different sections. The Vice-Presidents elected by the English members present, were Major-Gen. Sir Joshua Jebb, K.C.B., Chairman of the Directors of Convict Prisons; Sir John Bowring, late ambassador to China; Mr. G. W. Hastings, the General Secretary of the Social Science Association; and Mr. L. Heyworth, of

Liverpool, and late M.P. The Secretary chosen was Mr. Westlake, of the Chancery Bar, the Foreign Secretary of the Social Science Association. The President of the Section of Comparative Legislation was M. Tielmans, President of the Court of Appeal at Brussels, and in this section several interesting discussions took place, more especially on the laws relating to the press in the different countries of Europe, in which Mr. Hastings and Mr. Westlake took part, describing the law of England on that subject, and the principles which have regulated our legislation. Mr. Westlake also contributed some valuable observations on the law of joint-stock companies established in foreign countries.

WE have received copies of the official despatches from Sir Hercules Robinson, Governor of Hong Kong, to the Colonial Office, stating the result of the official inquiry into the charges made by the late Attorney-General of the colony, Mr. T. Chisholm Anstey, against a Mr. Caldwell, a Government official in the island. Mr. Anstey is entirely exonerated from the accusation made against him by Sir John Bowring, (and for which he was dismissed from the office of Attorney-General,) of having brought rash and malicious charges against Mr. Caldwell; that individual being adjudged guilty of confederating with pirates, as alleged by Mr. Anstey. In our next number we shall feel it our duty to observe on the extraordinary disclosures made in these despatches.

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### APPOINTMENTS.

LORD Stanley, M.P.; Lord Overstone; Sir William Erle; Sir W. Page Wood; Sir Hugh Cairns, Q.C., M.P.; Horatio Waddington, Esq.; W. R. Grove, Esq., Q.C.; W. M. Hindmarch, Esq., Q.C.; W. E. Forster, Esq., M.P.; and William Fairbairn, Esq., F.R.S.; have been appointed Her Majesty's Commissioners to inquire into the working of the law relating to Letters Patent for Inventions.

R. J. Phillimore, Esq., D.C.L., has been appointed Queen's Advocate in the room of Sir John Harding, resigned, and Her Majesty has granted him the dignity of Knighthood of the United Kingdom.

Travers Twiss, Esq., D.C.L., has been appointed Advocate-General to the Admiralty, vacant by the elevation of Sir R. J. Phillimore.

B. S. Follett, Esq., Q.C., has been appointed Registrar of the Office of Land Registry, under the Act of last Session, and R. H. Holt, Esq., Assistant Registrar.

Mr. James Grant, of the Northern Circuit, has been appointed Revising Barrister for the Northumberland district.

Mr. Edward Mortimer Archibald has been appointed Her Majesty's Judge, and Mr. William Dudley Ryder Her Majesty's Arbitrator, in the Mixed Court, established at New York, under the treaty of April 7th last, between Great Britain and the United States, for the suppression of the African slave trade.

Mr. William Nichols, formerly one of the Commissioners of the Insolvent Debtors' Court, of London, and lately one of the Registrars of the Manchester Court of Bankruptcy, has been appointed Judge of the Birmingham County Court, in the room of Mr. Leigh Trafford, resigned; and Mr. George Harris of the Temple, Deputy Judge of the Birmingham County Court, has been appointed to succeed Mr. Nichols, as Registrar of the Manchester Court of Bankruptcy.

SCOTLAND.—Dr. Douglas Maclagan has been appointed to the Chair of Medical Jurisprudence and Police in the University of Edinburgh; and Mr. James Muirhead, Advocate, Professor Elect of Civil Law, in the room of Mr. Swinton, resigned.

CHINA.—Mr. Henry John Ball has been appointed Judge of the Court of Summary Jurisdiction; and Mr. Charles May, and Mr. John C. Whyte, Police Magistrates for the Colony of Hong Kong.

INDIA.—Mr. H. M. Reily, Deputy Magistrate and Deputy Collector of Conercolly, has been transferred to Furredpore, as Magistrate, and Mr. W. H. Barker, Officiating Deputy Magistrate and Deputy Collector of Chittagong, to Nodcolly, as Subordinate Magistrate. Mr. G. S. Fayan, has been appointed to officiate as First Judge of the Court of Small Causes, in Calcutta, during the absence of Mr. Boulnois. Mr. F. B. Kemp, to officiate as Judge of the Court of Sudder Dewanny and Nizamut Adawlut. Mr. F. C. Fowle to officiate as Civil and Sessions Judge of Shahabad. Messrs. E. Jackson, C. H. Campbell, A. A. Swinton, and W. B. Buckle, Civil and Sessions Judges, respectively of Nuddea, Jessore, Tipperah, and Backergunge. Mr. A. J. Lewis, Advocate-General, Bombay, an additional Member of the Government Council of Bombay, for the purpose of making laws and regulations. Mr. R. J. Corbet, a Member of the Legislative Council, and a Justice of the Peace, for Ceylon. Mr. H. F. Mutukisna, Acting Deputy to the Queen's Advocate, for the Northern Circuit, vice Murray. Mr. T. L. Gibson, District Judge, and additional Joint Commissioner of the Court of Requests, Jaffna, vice Price retired. Mr. J. B. Graves, District Judge, Commissioner of the Court of Requests, and Police Magistrate of Kurnegalle, vice Gibson promoted. Mr. D. E. De Saram, Commissioner of the Court of Requests and Police Magistrate of Kandy, vice Graves promoted; and Mr. G. Stewart, Commissioner of the Court of Requests and Police Magistrate of Gampola, vice De Saram promoted.

MALTA.—Francesco Fitani, Esq., LL.D., has been appointed one of Her Majesty's Judges of the Island of Malta, and Mr. Henry Felix J. Recano, of the Middle Temple, has been appointed to act as Judge of the Supreme Court of Gibraltar, during the absence of Sir James Cochrane, Knt.



## Necrology.

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### July.

- 16th. **ROLFE, CHARLES WELLS, Esq., Solicitor, aged 59.**  
 24th. **CRAWLEY, GEORGE ABRAHAM, Esq., Solicitor, aged 66.**  
 26th. **BADGER, THOMAS, Esq., Solicitor, aged 70.**  
 26th. **HARRISON, F. J., Esq., Solicitor, aged 35.**  
 30th. **TRAILL, DR. THOMAS STEWART, Professor of Medical Jurisprudence in the University of Edinburgh, aged 80.**

### August.

- 5th. **MOSELEY, JOSEPH, Esq., Chief Justice of the Gold Coast.**  
 9th. **HARRISON, GEORGE MARSH, Esq., Solicitor, aged 58.**  
 10th. **HUSTWICK, WILLIAM ANTHONY, Esq., Solicitor, aged 23.**  
 12th. **TURNER, JOHN, Esq., Barrister, aged 88.**  
 17th. **PATERSON, WILLIAM SIMPSON, Esq., Solicitor, aged 60.**  
 18th. **BARKER, CHARLES HENRY, Esq., Solicitor, aged 35.**  
 20th. **CHADWICK, WILLIAM, Esq., Solicitor, aged 51.**  
 27th. **HOGG, THOMAS JEFFERSON, Esq., Barrister, aged 70.**  
 27th. **INGOLDSBY, CHRISTOPHER, Esq., Solicitor, aged 45.**

### September.

- 5th. **FROST, CHARLES, Esq., Solicitor, aged 81.**  
 8th. **POWELL, HENRY, Esq., Solicitor, aged 59.**  
 14th. **COOMBE, W. A., Esq., Solicitor, aged 66.**  
 14th. **PEARSON, CHARLES, Esq., City Solicitor, aged 68.**  
 15th. **HOLLINGS, J. F., Esq., Barrister.**  
 17th. **RICHARDSON, JOHN CRESSEY, Esq., Solicitor.**  
 17th. **LAWRENCE, JOHN WILLIAM, Esq., Solicitor, aged 38.**  
 27th. **CROPPER, JOSEPH ALMOND, Esq., Barrister, aged 80.**  
 29th. **YAPP, RICHARD, Esq., Jun., Barrister, aged 28.**

### October.

- 2nd. **MILLER, HENRY, Esq., Solicitor, aged 63.**  
 13th. **POTT, FREDERICK WILLIAM, Esq., Solicitor, aged 69.**  
 18th. **RADCLIFFE, JOSEPH ORMSBY, Esq., LL.D., Q.C., Judge of the Consistorial Court, Ireland.**  
 20th. **RILEY, JOHN, Esq., Barrister.**  
 21st. **BUBB, JOHN, Esq., Solicitor, aged 66.**  
 23rd. **METCALFE, FREDERICK, Esq., one of the Registrars of the Court of Chancery, aged 45.**  
 23rd. **SMITH, J. G. S., Esq., County Court Judge, aged 64.**  
 25th. **KELL, WILLIAM POTHILL, Esq., Solicitor, aged 66.**

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**No. XXVIII.**

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**ART. I.—PROCEEDINGS ON THE TRIAL OF THE  
CAUSE SEYMOUR v. BUTTERWORTH, FOR  
LIBEL.**

**BEFORE LORD CHIEF JUSTICE COCKBURN, and a Special Jury,  
at Westminster, on the 2nd December, 1862.**

**Counsel for the Plaintiff, Mr. LUSH, Q.C., Mr. KEANE, and  
Mr. J. BROWN.**

**For the Defendant, Mr. Serjeant SHEE, Mr. HAWKINS, Q.C., and  
Mr. R. A. FISHER.**

**The pleadings were opened by Mr. KEANE.**

**The Declaration set out at length the article published in Vol. XIII.  
of the LAW MAGAZINE, at page 158, and headed " William Digby  
Seymour, Q.C., M.P." The Damages were laid at £5000.**

**Plea, Not Guilty, on which issue was joined.**

**Mr. LUSH, Q.C. :—May it please your Lordship ; Gentlemen of  
the Jury ;—I appear on behalf of a member of my own profession,—  
a gentleman of rank in that profession, who has been for several  
years a member of the House of Commons, to complain of a most  
scandalous libel which has been published against him by the  
defendant, Mr. Butterworth, who, I may say, though the defendant  
here, is only the nominal defendant, as being the publisher of the  
periodical in which the libel appears. It is a libel published, not in  
a letter from one individual to another,—not even in a newspaper,  
which (though a newspaper may circulate more extensively than**

this periodical) when once read may be, and perhaps generally is, laid aside and its contents forgotten, or at all events not kept to be appealed to,—but published in a periodical well known to every member of the legal profession and to every branch of it—a periodical which has been in existence now for many years, and which is intended to be kept, and is in fact kept, in the library of every lawyer who takes it in, as a permanent record and book of reference for that which is contained in it. It is in such a publication as that that this scandalous libel has been inserted for which Mr. Seymour now comes before you to claim compensation in order to vindicate his character.

Gentlemen, Mr. Butterworth, the well-known law publisher, is the defendant on this record. Who the writer of the article of which Mr. Seymour complains, is, we have been unable to ascertain. If I could name him to you, very likely we might be able to trace the origin of the spirit which is manifested throughout the libel. I am utterly unable, however, to do that. He shelters himself under the name of Mr. Butterworth, who defends this action. But, gentlemen, although I cannot trace out the individual by whom this libel was written, you will be at no loss to see, when I come to read it to you, that it has been penned by some person who, for some reason or other, has a most vindictive feeling towards Mr. Seymour, and that the manifest object of the writer has been to crush Mr. Seymour, if possible, both as regards his professional and political career. The libel attacks him in almost every capacity of life. It sneers at his origin and at his education. Every step in advance which Mr. Seymour has made, whether in professional or political life, has been made the subject of vile imputations against him ; and I think that when I come to read the libel to you, you will not entertain the slightest doubt as to what the object of the writer was. Mr. Seymour's object in bringing this action was, that he might have an opportunity, now for the first time, of having the whole of his conduct brought before a jury in order that they might determine whether the charges which have been made against him are true or false. The writer of this article, however, shrinks from justifying it ; and now that an action is brought against the defendant for having published it, he has not pleaded the truth of one single charge contained in it, but has merely pleaded that he is not guilty ; the consequence of which is, that no issue being raised upon the question whether the charges are true or false, the defendant is not permitted to prove their truth, and I, on the part of Mr. Seymour, am not permitted to prove their falsehood. Mr. Seymour, therefore, is now

in this position, that he will come into the witness-box without your being able to try whether the charges in respect of which this action is brought are true or false ; and all I am permitted to do in this stage of the proceedings is to give you such a history of the circumstances which are referred to in this libel as will enable you to understand the allusions that are there made, and to appreciate the spirit and the animus of the writer.

Now, gentlemen, as I have said, Mr. Seymour is assailed from the beginning to the end of his career ; and therefore I must tell you shortly what Mr. Seymour's history has been. He is the son of a clergyman of eminence in Ireland, (a clergyman of the Established Church,) and a member of one of the oldest families in that country. He is here sneered at as having had little or no education, as being no scholar : I may, therefore, tell you, that Mr. Seymour graduated with honours at the Dublin University, where he obtained several prizes for literary and collegiate productions. He came to England, and was called to the bar of this country in the year 1846. He chose the Northern Circuit ; and in the year 1852 he was elected a Member of Parliament for Sunderland, one of the towns on his own circuit. He was getting at that time into considerable practice. He attended the sessions at Durham, Newcastle-upon-Tyne, and Hull. He became the leading counsel at those sessions, and was in the habit of receiving briefs in prosecutions on the part of the Crown, by the Post Office, and so on ; and, holding that position, he was, in the year 1854, appointed Recorder of Newcastle-upon-Tyne. I mention this because every single step you will find is made use of in this libel to cast the vilest imputations against him. He was appointed, as I have said, Recorder of Newcastle-upon-Tyne in the year 1854 ; and from that time to the present he has held that judicial office. Upon receiving his appointment as Recorder, it became necessary that he should vacate his seat for Sunderland. Upon his doing so, he went down to Sunderland again ;—he failed to be re-elected, but in the year 1859 he put up for the borough of Southampton, for which he was elected, and he sits as one of the Members for that borough to the present day.

Now, gentlemen, as to Mr. Seymour's advancement at the Bar. I have told you that he became the leader of the sessions which he attended on the Northern Circuit. He had become Recorder of the town of Newcastle-upon-Tyne, and was appointed, as the voluntary act of the learned Judges who went the Northern Circuit in the year 1860, Queen's Counsel in the County Palatine of Lancaster. I do not know whether you, gentlemen, are aware that that is a Pala-

tinate jurisdiction in which dignities are granted to members of the Bar which are confined to that county, but which are generally considered as stepping-stones to further dignities extending over the whole country. In August, 1860, he was appointed by the senior Judge who went the Northern Circuit, (with the perfect assent of the other Judge,) Queen's Counsel of the County Palatine of Lancaster, and he held that rank until he received his patent as Queen's Counsel for England from the late Lord Chancellor Lord Campbell. He was in Parliament in 1859, when he sat for the borough of Southampton, and having been appointed Queen's Counsel within the County Palatine of Lancaster in August, 1860, he received, in the month of February, 1861, in conjunction with a number of other learned friends of mine belonging to the Northern Circuit, a patent as Queen's Counsel for England. That being made the subject of comment here, I mention it to you as a matter of fact, in order that you may see the meaning and the animus of the writer in referring to it. I believe I may say, without disparagement to any one of my learned friends who received the rank of Queen's Counsel at the same time as Mr. Seymour, that his practice at the bar at that period as completely justified that appointment being conferred upon him as did that of any others of my learned friends who took rank with him.

Now, gentlemen, shortly after that appointment, Mr. Seymour received an intimation from the Benchers of the Middle Temple, (to which Inn he belonged,) that certain charges had been made against him which they desired he should appear before them to answer. I make no complaint of that honourable body for the course they took in summoning Mr. Seymour to appear before them; but it was certainly most unfortunate that the charges which were then for the first time presented against Mr. Seymour, should not have been brought forward until after he had received from the late Lord Chancellor, Lord Campbell, the appointment of Queen's Counsel; and probably you will be surprised to hear that he was then, for the first time, called upon to answer, not for any professional misconduct (with the exception of one matter which I will speak of presently), but for conduct in other relations of life, eight years, seven years, and, the most recent, six years ago.

Now I have said, I do not know who the writer of this article is, neither do I know how much, if anything, the writer of it had to do with the charges which were brought before the Benchers of the Middle Temple against Mr. Seymour; but this I do know,

that those charges must have been known to whoever brought them forward, years before ; and it is most unjust as well as most unfortunate that so long a period should have been permitted to elapse before making imputations such as these against the character of a professional man. These charges were not made until after Mr. Seymour had obtained promotion in his profession ; and when he was called upon to answer them, several witnesses were dead, papers had been destroyed, and his means of exculpation were thereby diminished. Supposing a person were indicted now in a criminal court for an offence alleged to have been committed eight years ago, he having been living among us ever since without anything of the kind having been imputed to him ; would there not be a public outcry that it was a most unjust thing after so long a lapse of time to call upon him to vindicate himself from such a charge ? However, so it was. Mr. Seymour was called on to answer certain matters which were alleged to have occurred years and years ago ; and, as I have said, they were not matters relating to his professional character at all. Mr. Seymour unhappily, like many other persons in their foolish giddy days, became connected at one period of his life with joint-stock companies ; and the charges which were brought against him were charges in connexion with one of them, and had nothing whatever to do with his professional character, with the single exception I will mention presently. He was summoned to appear before the Benchers ; he attended, and the charges which had been made against him were investigated. That investigation occupied a very considerable time, and in the course of the inquiry it turned out (and this is the one exception to which I have just referred, for this did relate to him in his professional capacity) that at one period, several years before, Mr. Seymour, having got into difficulties and into debt, had become, as the result of his speculation in shares in joint-stock companies, the debtor of a solicitor ; the solicitor had applied to him for payment, and Mr. Seymour, being unable to pay, had offered, as the only means by which he could discharge the pecuniary obligation he was under, to return whatever fees should come to him from that solicitor's office. I do not for one moment mean to say that that is not unprofessional conduct. No doubt the proper etiquette of our profession forbids it ; but this I do say, that it was the only mode in which payment could be made by Mr. Seymour, and, say what you will about its being a violation of professional usage, (and I admit it is so,—do not suppose

that I mean to justify it for a moment,) it is not a ground for any imputation against the moral character of a professional man.

Now the hearings went on for a considerable period. During this time, indeed before this time, probably as the result of his unhappy connexion with joint-stock companies, (though no shareholder ever complained,) vague and misty rumours, not taking any specific form, got abroad ; and while the investigation was going on before the Benchers, it was industriously circulated among Mr. Seymour's constituents at Southampton that their representative was the subject of very grave and serious charges before the Benchers of his own Inn. Now, the human mind is so constituted that if some vague wild rumour is circulated to the disparagement of any individual, and if that goes on for any length of time, people get to believe that something very bad must have occurred ; and their minds become in such a condition as to make them scarcely able properly to adjudicate upon it. The investigation went on, as I have told you, for a considerable time ; and in the result the Benchers of the Middle Temple came to the conclusion, that the charges which had been made against Mr. Seymour had not been proved, with the exception of the one I have mentioned, (which he himself admitted so far as it was a charge,) namely, that he had written to a solicitor by whom he had been pressed for the payment of a debt, stating that he could not pay him, but that he was willing to return him any fees he might receive from him. As to the other charges, the Benchers came to the conclusion that they had not been proved against him ; but they thought fit at the same time to append to their judgment a rebuke or reproof for what Mr. Seymour had done six, seven, and eight years before, which the writer of this article has made the occasion of the malignant effusion I am going to read to you. Before I read it, however, let me come to an end of the history I have been giving you, in order that you may understand every word of what is written here. Mr. Seymour went down to his constituents at Southampton shortly after the decision of the Benchers, and on his arrival there he found that not only had information reached some of his opponents of what the decision of the Benchers had been, but, by some means or other, information had reached them not only as to the names of the Benchers who had voted, but how they had voted ; and it was industriously circulated through the town that Mr. Seymour had been convicted. They had taken the reproof which the Benchers had thought fit to administer, as a verdict of guilty ; and when Mr. Seymour went down to Southampton to meet



his constituents, he found the town placarded with insinuations which were put forward by an anonymous and disappointed elector ; and he was challenged at a public meeting to state whether or not he had been convicted by the Benchers of the Middle Temple of the charges which had been made against him. Of course, considering the state of mind in which Mr. Seymour was at that time, it would be hardly fair to measure with nice precision the words that he then used. He had, at that time, undergone the most trying ordeal to which any man in our profession can be subjected ; he felt the injustice of these old charges being raked up against him at the very time when promotion had been accorded to him by the Lord Chancellor ; he felt hurt by the reproof which the Benchers had thought fit to administer to him in the same breath in which they said that the charges against him had not been proved, and he felt hurt and indignant that information should have reached his opponents at Southampton which he himself had never obtained, and that the town should be placarded with insinuations against him ; and on that occasion he made an address to his constituents which the writer of this libel has taken occasion to criticise in a way you will presently hear.

Now, gentlemen, this is an outline of the circumstances relating to Mr. Seymour to which the libel points. It was necessary that you should know them because you would not otherwise have been able to understand the allusions that are here made ; and now let me read to you the article of which Mr. Seymour complains, and then ask you to judge for yourselves whether it is a fair and legitimate comment on matters of public notoriety, (which I suppose my friend will be instructed to contend it is,) or whether it is not a malignant and studied attack on the whole of Mr. Seymour's private and professional life for the purpose of crushing him. I am not here, gentlemen, to say one word against the liberty of the press. This action is brought with no such object. I think we have scarcely a greater social right than the right of free discussion in the press ; but, at the same time, I believe it to be necessary to the maintenance of that right, that it should be carefully guarded and kept within its proper limits. I quite admit that you may discuss in a newspaper the public conduct of every public man, from the highest subject in the realm down to the lowest official. Every man's public acts are open to public criticism. A Member of Parliament may be criticised for his public conduct ; you and I, for what we do at this moment and in this cause, may very properly be criticised by the press ; but the press must take care not to go beyond that. If



you go beyond a man's public conduct, and impute corrupt motives to him ; if you attack him in his private relations of life, you then abuse the liberty of the press, and become liable to an action or to an indictment for a libel. If the writer of this article had contented himself with a mere criticism of Mr. Seymour's conduct in Parliament or at the Bar, however severely he might have dealt with him, it could not have been made the subject of an action if what he wrote had been written *bonâ fide*. Again, if the writer of this article had criticised anything that Mr. Seymour had published to the world, he would have been at perfect liberty to do so, but you cannot and you ought not to make a man's public or professional conduct a peg on which to hang charges, which otherwise you would not be at liberty to make. The moment you go beyond what a man does in public and attack his motives, you go beyond that liberty which the law accords to you.

Now, gentlemen, let me ask you, on reading to you the article of which Mr. Seymour complains, whether the writer of it can be said to be merely commenting on anything that Mr. Seymour had done in public, or whether it is not manifest that he intended from first to last to take occasion from what had been done, and what had been rumoured, to carry out the purpose which he had in his mind—a purpose to ruin and crush Mr. Seymour. Whatever rumours may be in circulation against an individual, rumours which take no specific shape, no man has a right to embody or condense and put them into print. No man is justified in charging another with any specific fraud or wrong because rumours of fraud and wrong may be in circulation. This writer, however, has so done. He is a man who, I suppose like all the rest of us, had heard that something had been said against Mr. Seymour, and he chose to assume all he had heard to be true, and put it into an indictment in the form of a letter attacking Mr. Seymour socially, politically, and professionally.

Let me now call your attention to the passages of which Mr. Seymour justly complains, and in fairness to the writer I will read you every word of the article from beginning to end. You will find that it is prefaced by general statements, of which, if they had stood alone, nobody could complain ; but he has obviously done so for the purpose of preparing the mind of the reader to receive as truth the specific charges which he intends to bring against Mr. Seymour. The libel is contained in the *LAW MAGAZINE AND LAW REVIEW* for May, 1862. The *LAW MAGAZINE AND LAW REVIEW* is a periodical which comes out quarterly : it has been in existence for

very many years, and may be found in the library of almost every lawyer. The article is headed

"WILLIAM DIGBY SEYMOUR, Q.C., M.P.—It cannot be denied, that the scandals which have lately been afloat concerning more than one well-known member of the Bar, have shaken the public opinion, hitherto prevalent, in the honour and high tone of the profession. Scarcely had Mr. Edwin James vanished from the scene, when two other learned gentlemen, one of whom is a scholar and a genius, and the other, though neither of these, still a barrister in some practice, and lately elevated to the rank of Queen's Counsel, became the subjects of a notoriety, painful to themselves and discreditable to the whole profession."

The allusion which is here made cannot be misunderstood. After mentioning one name, (that of Mr. Edwin James,) another person is referred to, who is said to be a scholar and a genius, and there can be no doubt whatever that the words "And the other, though neither of these, still a barrister in some practice, and lately elevated to the rank of Queen's Counsel," are intended to apply to Mr. Seymour, who is here described as being "neither a scholar nor a genius."

"Such frequent evidence of something rotten in our state, has naturally caused inquiry as to the constitution of the learned bodies who are supposed to watch over the morality of the profession, and into the laws and customs which regulate the conduct of the Bar towards the public and each other. We will frankly say that, in our opinion, the assertion commonly made as to the deterioration of the Bar, though often exaggerated, is not without foundation, and we believe that several causes, for some time in operation, have combined to produce this result. The increased laxity of admission to the Bar, which has made the degree ridiculous as any test of learning or respectability, is unquestionably one of them; and the rapid creation of a number of second-rate public offices, tenable only by barristers of a few years' standing, is another. The patronage now dispensed among the Bar, and chiefly, we are sorry to say, by favouritism and family influence, is enormous, and so far from being any real advantage to the profession, is becoming its curse. The Bar is flooded by a race of place-hunters, ignorant of law and careless of practice, whose merit rests on a certain seniority in the Law List, and their prospects on the hope of patronage. It would be idle to expect from such men any high appreciation of the true dignity and duty of the Bar, or any veneration for its traditionary usages. They are mere birds of passage, using the degree which they have obtained as the stepping-stone to their real vocation in life—an obscure but comfortable office. We do not say that these members of the Bar, now so numerous, are necessarily wanting in honour or morality; such a sweeping censure

would be foolish and unjust, for doubtless there are many honourable men to be found amongst them ; but, as a rule, we cannot entertain a doubt that the standard of all those feelings which go to the composition of a high-minded gentleman, is lower among the men who seek for place than among those who, free of obligation to others, earn their bread by an independent profession. But there is still another evil influence at work, to which we allude with hesitation, seeing the delicacy of a subject which is in some degree foreign to our province ; we mean the relations that have grown up between the Bar and the House of Commons. In former times, when the difficulties of finding a seat in Parliament (except for the fortunate nominees to pocket boroughs) were much greater than at present, a barrister, as such, seldom entered the House, unless he were a candidate for a high legal office, or was capable of taking the post of a leading lawyer in the Opposition. In those days, the representatives of the Bar were few in the Commons, but they were nearly always able and eminent men, whose legitimate ambition was fixed on the higher prizes of the profession. The House still contains such men, and the Bar has still reason to be proud of such representatives ; but they now form only a small proportion of the total number of barristers in Parliament. Since the passing of the Reform Act threw open a number of popular constituencies, the array of 'gentlemen of the long robe' in the House has largely increased, and we believe that at the present moment upwards of seventy of the Bar have added the cares of legislation to their labours in practice. Whether these legal gentlemen make the best representatives is a question on which we do not enter ; the fact that they are returned by free and intelligent electors constitutes a presumption that they do so ; it is their influence on the *morale* of the Bar with which we have to deal. Now, as it is certain that the great majority of the Sanhedrim we have alluded to can never become Solicitors-General or Puisne Judges, it follows that the current price of a barrister's parliamentary support has fallen terribly of late years. The glut in the market has seriously diminished the value of the article. In bygone days, we may presume that a counsel who had obtained a seat in the House, yielded his political virtue to nothing less than a descent by the Jupiter of the Treasury in a golden shower of judicial dignity, or a law officer's emoluments ; but now-a-days, votes are won and a too demonstrative independence is wooed away by the humbler agency of silk gowns, second-class recorderships, and even the obscure counselships to Government offices."

Nobody would have a right to complain of this, but you will see that the writer is now feathering the arrow which he means to point at Mr. Seymour.

"What effect this new development of patronage may have on a House which professes to be jealous of any official encroachment on

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would be foolish and unjust, for doubtless there are many honourable men to be found amongst them ; but, as a rule, we cannot entertain a doubt that the standard of all those feelings which go to the composition of a high-minded gentleman, is lower among the men who seek for place than among those who, free of obligation to others, earn their bread by an independent profession. But there is still another evil influence at work, to which we allude with hesitation, seeing the delicacy of a subject which is in some degree foreign to our province ; we mean the relations that have grown up between the Bar and the House of Commons. In former times, when the difficulties of finding a seat in Parliament (except for the fortunate nominees to pocket boroughs) were much greater than at present, a barrister, as such, seldom entered the House, unless he were a candidate for a high legal office, or was capable of taking the post of a leading lawyer in the Opposition. In those days, the representatives of the Bar were few in the Commons, but they were nearly always able and eminent men, whose legitimate ambition was fixed on the higher prizes of the profession. The House still contains such men, and the Bar has still reason to be proud of such representatives ; but they now form only a small proportion of the total number of barristers in Parliament. Since the passing of the Reform Act threw open a number of popular constituencies, the array of 'gentlemen of the long robe' in the House has largely increased, and we believe that at the present moment upwards of seventy of the Bar have added the cares of legislation to their labours in practice. Whether these legal gentlemen make the best representatives is a question on which we do not enter ; the fact that they are returned by free and intelligent electors constitutes a presumption that they do so ; it is their influence on the *morale* of the Bar with which we have to deal. Now, as it is certain that the great majority of the Sanhedrim we have alluded to can never become Solicitors-General or Puisne Judges, it follows that the current price of a barrister's parliamentary support has fallen terribly of late years. The glut in the market has seriously diminished the value of the article. In bygone days, we may presume that a counsel who had obtained a seat in the House, yielded his political virtue to nothing less than a descent by the Jupiter of the Treasury in a golden shower of judicial dignity, or a law officer's emoluments ; but now-a-days, votes are won and a too demonstrative independence is wooed away by the humbler agency of silk gowns, second-class recorderships, and even the obscure counselships to Government offices."

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to every man of honour among us"). "Mr. William Digby Seymour was called to the bar in 1846, and has since practised on the Northern Circuit. He has lately informed his constituents that he was born an Irishman; but we should have thought this information, to any one even slightly acquainted with the honourable member, was altogether superfluous. He likewise attributes to his nationality the bitter hostility with which, as he alleges, he was at first received, and has since been maligned and persecuted, by his brethren on the Northern Circuit. He came among us, as he says, with 'the curse of Swift' upon him, and gives us to understand that nothing but his unrivalled genius and purity of character could have enabled him to survive and triumph over this natal calamity;" (you observe the irony that runs through the whole of this;) "whatever credence we may wish to attach to every statement conveyed in the mild and measured language of Mr. Seymour, we must take exception to the idea that Irish birth constitutes disqualification for professional popularity or success. An eminent Englishman, himself an ornament to his Alma Mater, when recently comparing in a public address the achievements of the various Universities in the United Kingdom, paid a high compliment to Trinity College, Dublin: and as a proof of the rare training given at that seat of learning, he adduced, among other instances, the fact that no less than five out of the fifteen Judges occupying the Bench had received their education in that famous University of Ireland. We believe that only four of the five are Hibernian by birth; but so large a proportion of Irishmen in the highest judicial position, and the well-earned success of many others from our sister island in the ranks of the Bar, are proof enough that the career of the profession is fair and open to all the Queen's subjects. But it is only just to Mr. Digby Seymour to admit that there are two kinds of Irishmen, and that the cordiality extended to the one is by no means secure to the other."

Observe under which class he places Mr. Seymour. Having already hinted, "It is not because you are an Irishman that you have not met with the reception which you say you ought to have had: it must have been something else;" you will see, when he comes to classify the Irishmen, under which class he places Mr. Seymour. He says:

"There is the Irish gentleman, generous, accomplished, and urbane—perhaps the highest type of the genus gentleman to be found in the United Kingdom. There is also the Irish blackguard, swaggering, foul-mouthed, and shameless: the most insolent of upstarts, the most unblushing of swindlers: never destitute of a quarrel, never at a loss for a lie. For as the Irish gentleman is of rare quality, so the Irish blackguard is consummate in his growth. Ireland is always great in extremes, more especially in her psychological productions. She has reared generals who have led their

armies to certain victories; and she has reared also the tribe of cabbage-garden heroes. She has adorned our Parliament with splendid orators and consummate statesmen, and has afflicted it also with a breed of bawling demagogues and venal fools. And so it happens that this green and prolific island, with the singular versatility of her race, has supplied to the Bar of England some of its brightest ornaments, and some of its blackest sheep; bestowing on the former a learning and eloquence which Englishmen are proud to admire, and enriching the latter with a power of impudence and a fertility in fraud which defy all description, as (to the uninitiated intellect) they pass all knowledge. Should one of this latter find his way to an English Circuit, it could hardly be considered a matter for legitimate surprise if he should become an object of suspicion and dislike, and *hic niger est* be the motto coupled with his name."

Does my friend mean to contend to-day that that is not intended by the writer of this libel to be applied to Mr. Seymour? The defendant has pleaded not guilty. Does he mean to say, "I did not mean that to apply to Mr. Seymour?" The application of it in the last sentence is perfect. After describing the one class, the other is described as "The Irish blackguard, swaggering, foul-mouthed, and shameless: the most insolent of upstarts, the most unblushing of swindlers." "The blackest sheep of the English Bar." "Enriched with a power of impudence and a fertility in fraud which defy all description." That is the description which is given of Mr. Seymour by the writer of this libel. You see now that all that had been said before was merely preparatory to bringing down this battery upon him; and here he is charged in the coarsest and broadest terms, not only with being "a blackguard, swaggering, foul-mouthed, and shameless," but as being "the most insolent of upstarts, the most unblushing of swindlers," possessed of a "power of impudence and a fertility in fraud which defy all description." That is the description which is here given of Mr. Seymour by the writer of this article, who, when he is brought into this Court and challenged to justify what he has said, declines to assert that any one single assertion he has made is true. Then he goes on to the details, and he says:

"But to return. Mr. Digby Seymour, whether received on the Northern Circuit with dislike and hostility, as he himself asserts, or with the ordinary courtesy and fairness exhibited by the Bar to new comers, as we prefer to believe, persevered in the profession he had chosen, and succeeded in obtaining a moderate share of practice. It is generally affirmed, indeed, that he was assisted to the latter by an agreement of a peculiar nature entered into with his father-in-law, who, at the time of Mr. Seymour's

marriage, was a solicitor in considerable practice; but we are unaware whether the rumour rests on any sufficient authority, and considering the subsequent pecuniary misfortune of his father-in-law, we should apprehend that the greatest service rendered to Mr. Digby Seymour by that relative was his return to Parliament for the borough of Sunderland, in conjunction with Mr. George Hudson, in the year 1852."

There again, if the writer had only condescended to assert that that was true, or that one word of it was true, I should have had the opportunity of proving whether it was true or not. I have told you that Mr. Seymour was in considerable practice before he knew that part at all; and he owed nothing whatever to the relationship which the writer has assumed to exist. He says:

"We never were able to discover that Mr. Digby Seymour, during his first sojourn in the House of Commons, added in any appreciable degree either to the usefulness or the brilliance of that assembly; we are not aware that any measure was secured by his exertions, or any principle elucidated by his oratory, or any party at all benefited by his adherence, save in the matter of his vote. For this last he was rewarded with the Recordship of Newcastle, to the just dissatisfaction of the Bar, who thought that better men had been passed over for an unworthy political motive."

I have told you that that appointment was made in 1854, at a time when Mr. Seymour was the leader of the sessions in those counties, and a person to whom, in the natural order, it would come. At the time when Mr. Seymour gave his vote in the House of Commons, the Recordship of Newcastle was not vacant—nobody dreamed that it would be vacant—and the vote which Mr. Seymour gave, therefore, could have had nothing to do with it. There is this note appended to the last passage I read:

"We observe that in his speech at Southampton, Mr. Digby Seymour instances his elevation to the Recordship of Newcastle as a proof of his *professional* success. We believe that Sir George Hayter could, if he were so minded, tell a different tale."

I say again, if there had been the least foundation for believing that there was any truth in the statement here made, Sir George Hayter could have answered the matter. Do they know, or do they not know, that Sir George Hayter has answered it? At all events, they might have pleaded that their statement was true, and they might have called Sir George Hayter to prove it. Then the writer goes on:

"It may, perhaps, be surmised that the appointment was dictated by a more intimate knowledge of the mood of the electors of Sun-

derland than the general public possessed ; for on vacating his seat, as he was compelled by law to do on acceptance of the office, and offering himself for re-election, Mr. Digby Seymour was defeated, and ousted for the time from political life. From that date till his return for Southampton, nothing noticeable is recorded of him, unless it be an undignified squabble, when sitting in his judicial capacity, with the Bar of the Newcastle Sessions. But it is only right to say that, on this occasion, Mr. Seymour was not solely in the wrong, and the incident is only worth alluding to as a curious example of that fatality for hot water which is this gentleman's habitual and unhappy characteristic."

I say that this passage and passages like this show what the animus of the writer is. Even when he is compelled to say a word in favour of Mr. Seymour, he cannot help adding something which will mar the whole effect of it.

"When Lord Derby dissolved Parliament in 1859, and it became evident from day to day that his adherents were gaining on the hustings, a curious phenomenon suddenly exhibited itself in political life. A number of gentlemen who up to that time had been distinguished, if they had any distinction at all, for their pronounced radical opinions, made the discovery that their political aims would be best served by a temporary transfer of support to their opponents, and that the surest way to provide for the triumph of liberal principles was to secure a conservative ministry in power. One of the converts to this new light, on the orthodoxy of which we pronounce no opinion, was the ex-member for Sunderland ; and we accordingly find him soliciting the votes of the electors of Southampton on the double ground of his professed liberal principles and his promised conservative votes. So happy a combination obtained, as it deserved, success ; and by the influence of a discontented section of one party, and through the confident (as it turned out, too confident) trust of the other, Mr. Digby Seymour was reinstated in the House."

Now observe this :

"It was, of course, anticipated by all who did not know him well, that he would keep to his hustings' agreement, and vote for Lord Derby's continuance in power ; those who *did* know him well were by no means surprised to find his name in the division list with the successful liberal party, when Lord John Russell brought on the motion that proved fatal to the conservative ministry. Mr. Seymour, with some others who had pursued a similar course, became the object of pungent observation in the conservative newspapers, which were just then employed in a chorus of reclamation at the factious conduct of the liberals. We confess that we have little sympathy for either complaint. A dissolution had been tried, many seats had been lost and won, and the opposition had a perfect right to try a fall with their antagonists at the earliest opportunity :

while as to the defection of the neutrals who had been helped into their seats by conservative support, the nature of the bargain precludes pity or condolence. On what principle is it reckoned, that because a man is faithless to his own party he will be true to another? On what security is that pledge taken, of which the absence of honour is an essential quality? *Caveat emptor* is a maxim salutary in all contracts, and the rawest emissary of the Carlton should know what manner of men they be for whom he angles in the muddy pools of a mercenary radicalism. The worst evil attending a weak Government is the necessity under which it labours to catch every possible vote in any quarter, and its besetting sin is an improper distribution of patronage. Lord Palmerston's present administration has probably never numbered a working majority of twenty trustworthy votes in the House of Commons, and the political circumstances of the time have tended to diminish the ranks of ministerial supporters. It probably became necessary to secure every doubtful adherent, and this consideration may palliate, but cannot excuse, the promotion of Mr. Digby Seymour to the rank of Queen's Counsel."

What is broadly insinuated here is, that Mr. Seymour purchased that rank which was given to him by the late Lord Chancellor, Lord Campbell, by the prostitution of his votes in the House of Commons.

"Even at the time of the appointment rumours were afloat in the profession that his conduct must form the subject of investigation by the Benchers of the Middle Temple; and we have heard that Lord Campbell, shortly before his death, expressed his deep regret that he had been ever led by political pressure to promise a silk gown to the member for Southampton."

Here again, if there was one syllable of truth in the statement that is made, it might have been proved. The fact is, that Mr. Seymour had happened to introduce a Bill into Parliament in that very session, the object of which was the amendment of the Court of Admiralty. The late Lord Chancellor was about to introduce a Bill for the same purpose himself. Mr. Seymour had passed his Bill through the House of Commons, and Lord Campbell was so pleased with it, that he took charge of it in the House of Lords, and within a week of that time he wrote to Mr. Seymour a letter, stating that he had made up his mind to recommend Her Majesty to give him a silk gown. The writer of this libel having said, "We have heard that Lord Campbell, shortly before his death, expressed his deep regret, that he had been ever led by political pressure to promise a silk gown to the member for Southampton," goes on to say, "if this be so, it furnishes a curious commentary on one portion of Mr. Seymour's speech at Southampton, in which he quotes the patronage of Lord

Campbell as a proof of the purity of his professional career. It is an extraordinary, and we believe an unprecedented fact, that a barrister should be arraigned before the Benchers of his Inn for improper conduct at the very time when the Crown has been induced to raise him to the superior rank of the profession. Yet this, we understand from his own lips, was the case with Mr. Digby Seymour; and the language employed by the Benchers in their judgment, forbids us to hope that the inquiry before them was either unjust or uncalled for. We are precluded, in common with the rest of the public, from ascertaining the exact nature of the evidence adduced against Mr. Seymour; and we conceive that the Bench of the Middle Temple have acted unfairly towards the Bar, as well as unwisely as respects themselves, in withholding a full report of the accusation and the proceedings thereon. That any injustice, however, can have been done by this silence, to the accused, we can hardly bring ourselves to believe; for, inasmuch as Mr. Digby Seymour is in possession of the whole evidence, and could give us the benefit of a total disclosure of all the circumstances of his trial, thereby putting himself right with the public—if the facts admit of his doing so—and as, notwithstanding occasional promises of such a disclosure, he remains silent, the only reasonable conclusion at which we can arrive is, that he does not consider the publication of the whole truth likely to improve his position. All we can do, under these circumstances, is to place before our readers, at one view, the various documents that have been made public on the matter, and to collect, as far as possible, the scattered gleams of light that have fallen, from time to time, on the dark shadows of this remarkable case. We will only premise in doing so, that whatever publicity the scandal may now have attained, is owing to Mr. Digby Seymour himself, as the Benchers had maintained an absolute silence up to the time when his speech to his constituents, on the 4th February last, was reported in the *Times* newspaper. This speech was delivered at a public meeting, called, we believe, at the instance of Mr. Seymour himself; but, provoked, according to his account, by the sinister rumours afloat concerning him, and more especially by a placard with which the walls of Southampton had been covered, and which was signed by a ‘disappointed elector,’ the type, we should imagine, of a somewhat numerous class in that flourishing borough. It is only fair to Mr. Digby Seymour to give verbatim that portion of his speech which relates more particularly to his trial before the Benchers.”

Then there is set forth in the article, the speech which, as I have told you, Mr. Seymour made when he went down to Southampton after the Benchers had given their verdict, and when he found the town placarded in the way I have mentioned. Perhaps my lord will allow my friend Mr. Keane to read it.



LORD CHIEF JUSTICE COCKBURN :—Certainly.

MR. KEANE :—“ I have been asked whether certain charges were not made against me affecting my honour as a gentleman and as a professional man—whether those charges were not such as, had they been proved, would have insured my being disbarred—whether the result was communicated to me in writing—and whether, as affecting the honour of a gentleman representing the town and county of Southampton, I am prepared to give a copy of the decision to the constituency, or to publish it in some manner calculated to allow every one connected with the town to see it. Now, I answer to the questions of my anonymous interrogator, that the printed evidence of everything which took place during an eight months’ investigation with closed doors, is open for his inspection, or for the gratification of his curiosity, at any hour or place he chooses to appoint. But I will also say this, that if he expects me upon this platform to-night, to endeavour in the compass of a few minutes to go over that which occupied so long a time—to parade before you, who could not without a full hearing, and without due consideration, judge of their merits, the details of this protracted inquiry—and to ask you to sit as a Court of Appeal upon the judges who were appointed to conduct it, then I say, I have not come to Southampton to submit to such conditions. Gentlemen, I have now been nearly sixteen years at the Bar. I never won a laurel, and never obtained a promotion, without a severe and arduous struggle. I came among the members of the Northern Circuit with that misfortune which my countryman, Grattan, has described. I came ‘with the curse of Swift upon me.’ I was an Irishman. I was made, from my earliest time, the mark of a cruel and jealous opposition, and a determined effort to keep me down if it were possible. But, gentlemen, their efforts failed. Step by step I vanquished one difficulty and another, and won by degrees the honours which I have received, and the dignities which I hold. I obtained a lead at my sessions. I obtained the best Recordership but one on the Northern Circuit. I obtained my rank a short time ago from two Judges, themselves formerly members of the Northern Circuit, of Palatine precedence at Liverpool; and finally, notwithstanding all my traducers—ay, and at the very time when detraction was doing its worst, I received the rank of Her Majesty’s Counsel, from the hands of the late Lord Chancellor Campbell. Gentlemen, I will tell you the high crimes and misdemeanours which formed the principal points of the recent inquiry. It was my misfortune, or, if my interrogator likes, it was my fault and error in judgment, to accept, many years ago, the chair of a company, and connect myself, more or less, with commercial speculations in London. Gentlemen, the charges, as they are called, which were brought against me, arose out of matters, the youngest of which is seven years old, and others dated back actually to ten years ago. The men who instigated these charges never

showed their faces—my real accusers never appeared, but, beginning with the efforts of a few individuals on my own Circuit, scandals were whispered about, which at last, by some means or other, which I have not been able as yet to detect or expose, led to the investigation by the Benchers of my Inn. Those charges arose out of these bygone and past transactions, and they who alone, if the charges were true, had a right or title to complain, were no parties to the institution of the inquiry. Gentlemen, without going into detail, I tell you this, that foot by foot, and inch by inch, I disputed the ground with my assailants. I was, upon fifteen different occasions, before the Benchers of my Inn, and I stood practically before fifteen different tribunals, because upon no two occasions were my judges the same. The examinations were conducted within closed doors. I would to God they had been conducted in the broad light of day, and before the face of my constituents and the country; they were conducted by men sitting down after dinner, varying in their numbers and attendance, and sometimes postponing the inquiry upon the most trivial grounds. But, gentlemen, whatever feelings were entertained towards me originally, there were many among those Benchers, who, I believe, were men of the highest honour, imbued with the spirit of justice, and actuated by feelings of generosity; and to them mainly, and to their indignation at the monstrous wrongs which I was enduring, I believe I owe at last the verdict which even my interrogator will not deny has been given in my favour. Gentlemen, I do sincerely hope that that public which claimed for a supposed lunatic the other day a public examination as to his mental capacity—I hope that public will declare, sooner or later, that a man holding my rank should not be tried in the dark, by a tribunal constituted like that before which I have appeared, upon any charges affecting his professional conduct or his private character. Gentlemen, I have now only in conclusion, to tell my ‘disappointed’ querist, that I have no objection on earth, if it pleases those who were my judges, to the publication to the world of everything which took place before them. I refer my ‘disappointed elector’ to those Benchers whom he has had the impertinence to name; and I believe, if he makes inquiry with the idea that he will gain any material to damage my character, he will come away a doubly disappointed elector. No, gentlemen, if the truth must be told, mine is a hard lot. When men had ceased to strike at my political character—when men had ceased to disown my professional claims, they have dared to assail my private honour; but, as I conquered the former, so I have succeeded in discomfiting the latter; and I tell this ‘disappointed’ one in particular, that if he will dare to show his front, and utter in plain language those slanders which he has dared to insinuate, I shall make him responsible before twelve men in a jury-box. Now, gentlemen, I have done; I have gone over the various points, which, fairly or unfairly, have been pressed upon your attention, and upon which



I have come down, though late, to Southampton, in the honest hope that I might receive from you a verdict such as would tell at once to the public that whatever cruelty I have encountered elsewhere—however the dirty fingers of certain members of my own profession have been employed in raking up the scandals of the past for the purpose of dragging up something to damage my reputation, yet that you sympathised with your representative—that you accepted the result—that you saw me still the member of an honourable profession, in spite of malice, and jealousy, and of political hate—still holding the rank which by such hard struggles I attained, and that you would, by your determination and by your pronounced opinion to-night, trample for ever upon this cruel attempt to call public attention to a matter which, hitherto at least, has been confined to a more limited circle, and has never yet been brought forth and laid before the glare of public day.”

Mr. LUSH:—That, gentlemen, is the speech they quote, which was made by Mr. Seymour at Southampton. The libel then goes on to say :

“If this speech took the public by surprise, it was read by the Bar and the Benchers, though on different grounds, with considerable astonishment. The Bar were amused to find that the promotion of Mr. Digby Seymour, first to the Recordship of Newcastle, and then to the rank of Queen’s Counsel, could be quoted as any approval of his professional character, when the favour shown him was notoriously the result of negotiations in the division lobby.”

What is that but a direct charge of corruption as a Member of Parliament? What is it but saying, “You have bartered your votes in the division lobby, and by reason of that you have obtained your two appointments”? I have already told you that the first he obtained in the regular course, when he was in such a position as fairly entitled him to it, and his vote was given before any vacancy in the Recordship was known or even thought of, in favour of the Ministry; and the second appointment was conferred upon him in company with many others of my learned friends, and I may say, without disparagement to those gentlemen, that Mr. Seymour was as much entitled by his practice to that distinction, as any of them were.

“But the Benchers of the Middle Temple were still more amazed to read in the columns of the *Times* that their treatment of Mr. Seymour had been either unjust in itself, or could form the ground of complaint on his part, still less that there was any obstacle to his publication of evidence printed at length, forwarded to him by their direction, and at the time of his speech lying in his chambers.”

Did the writer of this article know that Mr. Seymour had pub-

lished an account of this evidence, but dare not circulate it publicly because other gentlemen, whose names were referred to in it, had given him notice not to do so, though that notice has since been withdrawn?

“Moreover, the professions of gratitude, tearful we are told, if not abject in their nature, with which Mr. Seymour had received the intimation of the Bench that they had taken a merciful view of his case, and would censure, without disbarring him, formed a strange contrast to the loud challenge and fierce denunciations with which he alluded to his trial at Southampton.”

The writer puts that in here, when he has in his hand at the same moment that which he puts into a subsequent part of the libel, Mr. Seymour's protest to the Benchers against what they had done; although he has that in his hand at the time, he represents Mr. Seymour's professions of gratitude to have been “tearful, if not abject in their nature.”

LORD CHIEF JUSTICE COCKBURN:—I can understand that, prior to an intimation being given to Mr. Seymour that the sentence of the Benchers is to be limited to censure, he expresses his gratitude; and afterwards, when the sentence is pronounced, that is followed by a protest.

Mr. LUSH:—Yes, my lord; that is what is meant. Then the writer goes on to say:

“In order to set the public right on one of these points, at any rate, the Under-Treasurer of the Inn was directed to forward the subjoined letter to the Editor of the *Times*, by whom it was published on Saturday the 22nd February. ‘Sir,—I am directed by the Masters of the Bench of the Middle Temple to inform you that a copy of the Judgment of the Benchers in Mr. Digby Seymour's case, and copies of the evidence and proceedings on which it was founded, were furnished to Mr. Digby Seymour by the Benchers before Mr. Digby Seymour made his address to his constituents at Southampton. I am, Sir, your obedient Servant, T. H. Dakyns, Under-Treasurer. Treasury Office, Middle Temple, Feb. 21.’”

Mr. Seymour says to his constituents: “I tell the disappointed elector that, if he will come to my chambers, he may see the whole of the evidence at any time.” But then they say, Mr. Seymour ought to have published it. His answer to that is: ‘I had notice from persons whose names are mentioned in the proceedings, not to publish; but the evidence is now at my chambers, and if you choose to come there and see it, you may read every line of it.’” The writer of this article, however, makes it appear that Mr. Seymour

had denied that he had it; and then, on the 24th, this letter was written by Mr. Seymour to the Editor of the *Times*, to contradict that false impression.

"Sir,—With reference to a letter in the *Times* of to-day, signed T. Dakyns, and stating that a copy of the proceedings before the Benchers of the Middle Temple was furnished to me before I addressed my constituents at Southampton, I beg to refer you to the report of my speech in your columns, which contains the following paragraph; 'Now, I answer to the questions of my anonymous interrogator, that the printed evidence of everything which took place during an eight months' investigation, with closed doors, is open for his inspection, or for the gratification of his curiosity, at any hour or place he chooses to appoint.'"

Then the writer of this article goes on:

"The above letter, like some others from the pen of Mr. Digby Seymour, curiously avoids the real question at issue. The point is not whether an 'anonymous interrogator' has been offered an inspection of the evidence, but whether Mr. Digby Seymour has not had, for some time past, the means afforded him of giving the fullest publicity to the facts alleged against him, and whether (in spite of his vehement asseverations of injured innocence, and desire for publication) he has not judged it more prudent to keep those facts concealed."

Now, really, after he had said to the people at Southampton, "The evidence is all at my chambers, and you are quite welcome to come and see it at any time you please," to charge him with avoiding the real question at issue, and with having intimated that he had not the means afforded to him of giving the fullest publicity to the facts alleged against him, shows certainly what the animus of this writer is, who will not look with favour on any single act of Mr. Seymour's conduct. Then the writer goes on to say:

"The Benchers, whose whole proceedings in this case have been secretive and dilatory to an unfortunate degree, did not publish their judgment on Mr. Digby Seymour at the time when it was given, being probably swayed by the same merciful considerations as induced them to confine that judgment to a censure of the delinquent; but on the same Saturday on which the letter of their Under-Treasurer was dated, the following judgment was screened in the Middle Temple Hall, where, as we think, it ought to have appeared long before."

Now comes the reproof which the Benchers pronounce:

"The Masters of the Bench have carefully considered the voluminous evidence and documents which have been brought before

them, and have come to the conclusion that the charges in the cases of 'Parker,' 'Coutts,' and 'Robertson,' respectively, are not proved, and that the charge as to a proposal to hold briefs for an attorney, in liquidation of his costs, payable by you, is proved."

Why, gentlemen, Mr. Seymour admitted it; he never denied it.

"The facts and circumstances which are disclosed fully satisfy the Masters of the Bench of the *necessity* for this inquiry, and they regret to add that they cannot accompany their intimation to you of their decision on the three charges first named, with any declaration that your conduct is not liable to censure; on the contrary, they have the painful duty to perform, of stating to you that they find much worthy of severe condemnation, even on the most favourable construction of your actions; that in Parker's case, on your own statement of your conduct, evidence appears of a want of open dealing towards and of concealment from Mr. Parker. Mr. Parker's agreement with you, or, your own version of it, was inconsistent with your substitution of your *credit* for the money you undertook to add to his own, and with the use of his money for any purpose unconnected with the printing scheme. The breach of your agreement in these two respects was not communicated to Mr. Parker, whose consent alone could have justified the course to which you actually resorted. The Masters of the Bench are also under the painful necessity of declaring their opinion that the settlement of Mr. Parker's action, while the charges of fraud included in it were, in the opinion of the Bench, not only *not* withdrawn, but were strongly re-asserted, as it was conduct calculated to destroy character by exciting suspicions that charges which were not boldly met could not be gainsayed, was an arrangement to which a right-minded man, even in the hour of heavy pecuniary distress, would not have submitted. They are compelled to add, that no solid ground presents itself on the evidence in justification of the affidavit which was made by you for the purpose of postponing the trial of the action in question. With respect to Captain Robertson's case, there is found in your statements at various times, in relation to that case, a want of consistency which indicates some recklessness of assertion."

You will bear in mind, gentlemen, that Mr. Seymour was called on, seven years after the transaction, to explain what had occurred with reference to a joint-stock company of which he was one of the directors. It was with reference to a matter that would necessarily involve the investigation of a number of books and papers, as to which Mr. Seymour was called on to give an account at that distance of time, that the Benchers said:

"There is found in your statements at various times, in relation to that case, a want of consistency, which indicates some recklessness of assertion. Your assertion, so often repeated, that you had generously

taken upon yourself very large liabilities which did not in any way belong to you, as you assert yourself to have been totally unconnected with, and innocent of, the transaction termed 'rigging the market,' is at variance with the statement in your letter to Mr. Lefroy, that the debt was as much Captain Robertson's as your own. The Masters of the Bench are unable to reconcile an act which, according to your version of it, would have been one of romantic generosity and self-devotion, (scarcely consistent with your duties to others and with the reasonable claims of justice,) with other portions of the evidence, and with the ordinary presumptions which arise from your conduct, as disclosed throughout these painful transactions."

That, gentlemen, is the reproof which the Benchers thought fit to administer to Mr. Seymour in relation to these three charges, the matters to which those charges related not being of a professional, but of a purely mercantile character. Those transactions occurred at a period when Mr. Seymour was comparatively a young man; and at the time when they were investigated by the Benchers, Mr. Seymour had ceased for many years to have anything to do with them. How many men are there, do you think, in middle life, who, if they were called to account for the irregularities of their youth, or the period when they had just arrived at manhood; how many men are there who, if they were called to give a strict account of their conduct in matters which occurred ten years ago, would be able so thoroughly to acquit themselves, as, in the judgment of a purely scrupulous mind, to be entitled to go away free from all blame? Who among us would be able to stand the test of such an investigation of our conduct when in the heyday of youth, or when we first mixed with the excitements of the world?

Then the Benchers go on to the fourth charge, which is a charge that Mr. Seymour had offered to pay a debt due by him to a solicitor, by returning the fees to be received from him. They say:

"The fourth charge relates to a matter of a different character. The Masters of the Bench are glad to find that it is not justified by you; but the grounds on which you attempted to palliate your conduct are not satisfactory to them. Your proposal was one most improper from a barrister to an attorney, and invited a breach of duty on the part of the attorney; a client would never be likely to suspect that his attorney, from secret motives of interest, was selecting an advocate for him whom otherwise he might not have chosen. It is conduct, therefore, promoting deception, and likely to generate suspicion where confidence should prevail. If such a practice were tolerated, it would lower the character and honour of both branches of the profession, and would be injurious to the public, not only by reason of such debasement, but also by its

tendency to introduce into, or maintain in, the practice of their profession, men more distinguished by the pliancy of their principles than by the gifts of nature improved by an industrious and honest pursuit of eminence by honourable means."

Gentlemen, in every word of that I entirely agree ; but again I say that, although it is a matter very proper for the Benchers to observe upon when they are sitting to adjudicate on a man's professional conduct, it is not a matter which entitles one of the public, like the writer of this article, to found upon it the violent and malignant charges he has made. It is very well indeed for men whose duty it is to protect the honour of the profession, and the public, to observe on the impropriety of a step like this, but it is very improper for any one of the public to found upon it such a libel as this; and again I say, that, although wrong it may be, and although wrong it is, looking at it with reference to professional propriety, it is, at all events, an honest transaction.

Then the writer of this libel goes on to say :

"The above judgment appeared at length in the *Times* of the 24th of February, and on the 25th the following letters and protest, forwarded by Mr. Digby Seymour, were published in that Journal."

Mr. KEANE:—This is a letter signed William Digby Seymour, dated "2, Dr. Johnson's Buildings, Temple, February 24th," and addressed to the Editor of the *Times*:

"Sir,—The Benchers of the Middle Temple are pursuing to the last the same course they adopted towards me from the first. They have 'screened,' and published their 'judgment,' but they thought proper to suppress my protest. I appeal to you to supply this significant omission, and request you will publish the documents I enclose. There are other grave matters between myself and the Bench, not detailed in this protest, which the publication of the whole proceedings will reveal to the eyes of the profession and the public. I say of 'the whole proceedings,' because the printed report furnished me is not complete. It does not contain all the 'evidence' and 'proceedings' of the tenth meeting. It does not contain the whole of the documentary evidence put in by myself, or my counsel, Mr. Lush, Q.C. It does not contain the names of the Benchers who voted for or against the various portions of this 'judgment.' This is no longer a case for any half publicity. I am now, by the very act of the Benchers themselves, entitled to have what I demand—the whole truth made known, ungarbled, and unabridged."

Then there is this postscript:

"To obviate the possibility of any misapprehension, I ought to add that, when I offered for inspection, by any interrogator, at

Southampton, 'the printed evidence of everything which took place,' I, of course, meant the printed evidence so far as it had been supplied to me."

There is then a letter addressed by Mr. Seymour on the 3rd of February, 1862,

"To the Hon. the Treasurer and Masters of the Bench of the Middle Temple.—Gentlemen, now that I have had an opportunity of perusing the observations which have been embodied with your decision, and of a copy of which I have to acknowledge the receipt, I cannot refrain from expressing my astonishment at their severity and injustice. In the first place, I do not know, nor have you pointed out, what version I have given of the transaction with Mr. Parker, inconsistent with my perfect right to act as I did with regard to the £500 I received from him. From first to last, my statement has been, and still most solemnly is, that Mr. Parker paid the £500 in consideration of becoming partner with me in one-half of my interest under the agreement with Captain Greene, an interest vested in me conditionally on my undertaking to spend £1,000 in forming a company. Having signed a contract with Captain Greene, the only duty that devolved on me was to expend £1,000 for the foregoing purpose, a duty which I honestly set about, and did, in fact, to a great extent discharge, but in the fulfilment of which I was mainly defeated by Mr. Parker's change of mind, and by the estrangement his clerk succeeded in producing between Captain Greene and me. The charge of concealment, and of unjustifiably using the money without Mr. Parker's consent, must fall to the ground if the foregoing proposition be admitted. With reference to the withdrawal of the pleas in Mr. Parker's action, I must remind you that I acted with the full approval of my legal advisers, (one of them a most eminent member of the Bar,) of my father-in-law, and of my wife; that I was distinctly told by Mr. Bennett, that Mr. Justice Wightman suggested the termination of the affair, to which alone I believed I was acceding; and that, besides the express evidence before you as to the unqualified declaration by Mr. Woollett, on Mr. Parker's behalf, that every imputation of fraud was withdrawn, you have the subsequent correspondence between Mr. Parker and myself, and the important evidence afforded by the entry of the judgment in the cause. I may here observe that so confident did I, and, I may add, Mr. Lush, feel that the Bench would have pronounced an unqualified judgment of acquittal. that I forbore applying to you to hear upon this point further oral and documentary evidence, which, after the meeting of December 2nd, I was, for the first time, placed in a position to adduce. The observation as to my affidavit, I think would never have been made, if it had been borne in mind that Mr. Hudson was in India at the time, and that I had obvious grounds to believe



he would have given more important evidence than, after the lapse of time, he was, in fact, able to do. Let me, in passing, remark here that Mr. Hudson's very caution in his evidence in Parker's case should fairly entitle him to greater consideration when he speaks positively on other matters with which his mind was naturally more familiar. In reference to Captain Robertson's case, I am charged with want of consistency in my statements, indicating 'recklessness of assertion.' The only instance pointed out upon which this grave charge is left to rest, is one which, I submit, does not in the remotest degree justify the observation. It is said that the expression in my letter to Mr. Lefroy, 'as much Captain Robertson's debt as my own,' is at variance with my assertion of non-complicity in the Waller rig; but, in the first place, the letter containing that expression was written more than a year after 'the rig' occurred, to a gentleman who was not concerned to know the exact relation in which his client and I stood regarding it: and, secondly, what was the debt I was writing about? It was a debt originally contracted by Mr. Heneage, on which he alone was legally liable to Mr. Helps. Captain Robertson was only bound *in honour* to assist in meeting it; because he was one of a number who engaged in a common operation for a common purpose. I, too, was only bound *in honour* to meet it, because I took upon myself that liability and others to an enormous amount, believing that the brokers acted in the honest, but false impression, that I sanctioned the act of the Board of which I was chairman, and indulging in the sanguine hope that the ultimate success of the company itself might reimburse me, or, at the least, diminish the amount of my loss. In this sense, and in this sense only, was the expression used, and to put any other sense upon it, in the face of the positive evidence given the other way, and of the original documents which formed the basis of the agreement between the directors and Lakeman, which is unsigned by me, and to which I was no party, seems to me to justify the remark that, to the last, every presumption has been made against me by the Bench. You go on to express your doubts as to my capability of doing an act in February, 1853, amounting to what you are pleased to designate as one of 'romantic generosity.' If you had given me notice of your intention to pass judgment on a matter which was only incidentally introduced to your attention, I could have produced nearly all the broker's notes, of which I took possession at the time, with other documentary evidence; and I could have called a number of witnesses to place my conduct beyond the possibility of an unfavourable construction. One piece of evidence, by way of example, I will venture here to cite. You will remember the name of Mr. Mercer Murray as having been frequently referred to in the course of the inquiry. He kept the key of the tin box in which Captain Robertson placed his securities on the Saturday, and his hands, if I mistake not, took them out and



delivered them to Mr. Heneage on the Monday. No man knows better, or so well as he, all the history of the transactions in Waller shares. Although I had no communication with him since February, 1853, and though we parted then under the circumstances I have described, I believed he would do me justice if called as a witness; and accordingly, during the last vacation, I tried, but in vain, to procure his presence in England for that purpose. In a letter, however, from him to me, and bearing date 'Hôtel de Rome, Vichy, L'Allier, France, August 10th, 1861,' he begins by observing: 'Yours of the 8th instant only reached me here this morning from Boulogne, and my first feeling was indignation at the falseness of the accusations against you.' He then adds, 'If ever a man deserved a crown of martyrdom, you were most justly entitled to it for the unparalleled exertions you made to prevent any dishonour attaching to the Company;' and he says further on, 'I, for one, can never cease to feel grateful to you for your self-immolation, that no breath of scandal should ever justly attach to any one at the Board.' A harsh and wounding suggestion, that I could not be so generous, is the return I get from my own profession. A 'crown of martyrdom' for an act of self-immolation is the award of Mr. Mercer Murray. Upon the last paragraph of your 'judgment' I wish simply to say, I think, having frankly admitted an error, these observations might have been spared, the more so as the Bench must bear in mind that I was placed, as regarded Mr. Brown, in the difficult position in which honesty pointed one way, and etiquette another. There is another subject to which I feel bound to call your attention. You have held fifteen meetings, and in no single instance has your parliament been composed a second time of the same members as any previous parliament. In point of fact, therefore, I have been tried before fifteen different tribunals. Your numbers have been equally irregular, varying from a maximum of eighteen to a minimum of seven. One of your number first attended at the fifth meeting, one first at the sixth, two at the ninth, two at the tenth, and one at the thirteenth! The following is an analysis of the attendance of all the Bench:—Two attended fifteen meetings, two attended fourteen, one attended twelve, two attended eleven, one attended ten, two attended nine, two attended eight, two attended seven, three attended six, two attended five, one attended four, two attended three, two attended two, and two attended one. Here is certainly a remarkable disregard both of the spirit and letter of the wise rule of the society, which requires the attendance of the same members on every adjourned hearing of an inquiry into an accusation against a barrister. I have no right to penetrate the secrets of your chamber, but I confess I should like to know how many of those who heard the evidence of Mr. Parker and his witnesses, took part, and, if so, what part, in framing or supporting the observations made with reference to that case, I appeal to those members of the Bench who were present at the third meeting,

whether the mode in which the evidence of Mr. Parker especially was given, did not strongly impress their minds with the impossibility of seriously regarding it. The perusal, more or less careful, of printed evidence (even were it of the most accurate character), can never supply the place of opinions derived from the hearing of the witnesses themselves; and I cannot help feeling that I have been hardly dealt with, if members of the bench who have only formed their conclusion upon the printed reports, intermixed and confused as the various cases are, have joined in reflections which, I firmly believe, would not have been made, or would have been greatly modified, had they attended the inquiry with greater regularity. It may, of course, be said, that my attention was called to this rule, and that I ought, on subsequent occasions, to have made objections on the ground of its non-observance; but my attention was not called to this rule till so late as the *ninth* meeting, though it ought to have been mentioned on the second, and it is obvious that it would at that time have placed me in a most invidious attitude to have appealed to this rule with reference to any Bencher I might have objected to. I could not, moreover, for a moment have anticipated that members of the Bench who had not heard the evidence as to any particular case, would have suggested observations, or even joined in a judgment, with reference to that case, of the fairness of which they were not, from this very circumstance, in a proper position to decide. On this ground, as well as those I have before specified, I beg to enter my solemn protest against that part of your judgment which contains the observations of which I complain, and which, I rejoice to know, have *not* received the unanimous approval of the Bench; and I request that this letter may be recorded along with the judgment."

To that letter there is this postscript:—

"The foregoing letter was written before I went down to address my constituents at Southampton on Tuesday evening last. The meeting was fixed for eight o'clock. I arrived at the terminus at twenty minutes to eight. I was then, for the first time, informed that the walls of the town were posted, and the people, as they went to the meeting, were being liberally supplied with a handbill, of which I beg to enclose a copy. I ask the Bench whether the peculiar wording of these four questions, and that so as to convey the most unfavourable construction, does not evidence the hand of some one who has been acting on information derived not very far from their parliament chamber. This, however, is not all. A prominent member of the Tory party in Southampton has been going from place to place, exhibiting a written document, giving in minute detail the result of the voting in your chamber on the various charges, the numbers for a verdict of 'Not guilty,' or of 'Not proved,' &c. Whence has this person been furnished with this information? By what right, and by whom, are facts made known to him which have

not been communicated to *me*? The answer is one I respectfully leave the Bench to supply."

That is followed by a letter from the Under-Treasurer of the Middle Temple, dated February 15th, 1862.

"Sir,—I am desired to acknowledge the receipt of your letter of February 3rd, 1862, addressed to the Treasurer and Masters of the Bench of the Middle Temple, and to say that it has been laid before the Bench."

Mr. LUSH:—You will observe, therefore, that when the writer sat down to write this very article, he had not merely the fact before him that the Benchers had found the charges against Mr. Seymour not proved, but he had also before him Mr. Seymour's full explanation of it all in the protest which has just been read, and yet he has ventured to call Mr. Seymour "the most unblushing of swindlers," one of the law's blackest sheep, a person "enriched with a power of impudence and fertility in fraud which defy all description." These are the data on which the writer of this article has ventured to use such words, he having before him at the very time Mr. Seymour's protest, and the fact that the Benchers had ignored the charges which had been made against him. Then the writer of this article goes on to say:

"It is not our intention to enter into any consideration of the specific charges brought against Mr. Digby Seymour, because, like the rest of the public, we are not yet in possession of the means for deciding on them impartially with a full knowledge of the facts. But when we consider that we have, on the one hand, the deliberate opinion of a number of honourable and distinguished men, who have gone fully into the case, and on the other the bare assertion of innocence by an interested person, who declines to take the plain course of publishing a complete statement of the circumstances, and that person one who publicly stated that the Benchers had given a verdict in his favour, when he held their condemnation in his hands—we cannot hesitate for a moment as to the verdict we must pronounce."

Mr. Seymour had stated, and had stated truly to his constituents at Southampton, that the Benchers had acquitted him of the charges which had been made against him; but this person says, "You held your condemnation in your hand at that very time," which would lead any reader to suppose that he held in his hand at that very time a verdict against him, and he says, "I will take upon myself to say that you were guilty of them all."

LORD CHIEF JUSTICE COCKBURN:—No; Mr. Seymour protested

against the censure; so far as the verdict was one of acquittal, Mr. Seymour would not, of course, protest against that; but he protested against the censure; and then the writer of this article says: "Considering who the persons are who pronounced the censure, and that it is the man against whom the censure is pronounced who is appealing against it, we have no hesitation as to the judgment we should pronounce." I think that is the fair construction to put upon it.

MR. LUSH:—I certainly should have read it in this way, "We have no doubt as to the verdict we should pronounce, that verdict being a verdict that you were guilty."

LORD CHIEF JUSTICE COCKBURN:—That is a matter for the jury; I must say, that on reading it, that is not how it strikes me.

MR. LUSH:—I am much obliged to your lordship. I do not desire to put upon one single word a meaning that it does not fairly bear. Then the writer goes on in this way:

"Until Mr. Digby Seymour has shown to the public, by a full and ungarbled publication of the evidence given before the Benchers, that their judgment was unjust, we must continue to believe that it was delivered in accordance with the truth, and that the censure therein was merited."

LORD CHIEF JUSTICE COCKBURN:—"The censure."

MR. LUSH:—Yes, my lord. That shows that your lordship's view was the correct one.

"Nor is our conviction in the slightest degree shaken by Mr. Seymour's claim to a crown of martyrdom, or by his continually repeated and never redeemed promise, of placing himself right before the world by a public vindication. The last time he had recourse to this expedient, now thoroughly worn out, was on the 4th of April last, in a letter to the *Times* which we extract here."

Then he sets out the letter to the *Times*, which is in these terms:

"Sir,—A statement appeared in the leading columns of one of your contemporaries of this day which is calculated, if not contradicted, to obtain a wide publicity, and to prejudice me most seriously. That statement is, that I have been expelled from the Bar of the Northern Circuit, having first been found 'wholly guilty' of the charges of which the same authority afterwards states that the Benchers found me 'half guilty.' I was most anxious at once, in my place in Parliament, to call attention to the paper in question, but I am told, on the highest authority, that the matter of the article was not such as to enable me to treat it as a breach of privilege. I have therefore placed the matter in the hands of my solicitor. I hope, however, you will permit me to say that the statement is utterly

false. I have not been found guilty by my Circuit of any one of the charges which were brought before the Benchers, nor have I been 'expelled from the Bar of the Northern Circuit,' a Circuit on which I hope long to continue to practise. All that has really occurred, both before the Benchers and on my Circuit, will, as soon as I can possibly do so, be placed before the public, who will then be in a position to judge between me and my accusers, and to form an estimate of my conduct and their motives."

Then the article goes on:

"The statement which appeared in the newspaper referred to by Mr. Seymour was certainly incorrect. Mr. Digby Seymour has not been expelled from the Northern Circuit, because there is no power residing in any quarter to expel him therefrom, as long as by the grace of the Middle Temple Benchers he may continue a member of the Bar. But can he deny, will he deny, that the Bar Mess of the Northern Circuit have relieved themselves of his companionship, by a resolution passed at a Circuit Court during the last Spring Assizes? We cannot believe that such a determination was arrived at without a fair, and even searching inquiry, into the charges brought against Mr. Digby Seymour."

Now, gentlemen, just observe what this is:—Somebody had written in the *Times* that Mr. Digby Seymour had been expelled from the Bar of the Northern Circuit, having been found wholly guilty there of the charges of which the Benchers had found him only half guilty. Anybody reading this passage would suppose that Mr. Seymour was no longer a member of the Northern Circuit. Mr. Seymour writes, "I have not been expelled from the Circuit: I am still there; and as to their having found me guilty, they have done no such thing;"—the fact being that, while this proceeding was pending before the Benchers, the gentlemen of the Northern Circuit met and came to a resolution that Mr. Seymour was not to be a member of the Bar Mess, but they did not find that the charges which had been made against him had been proved. That they came to a resolution to exclude him from the Bar Mess is one of the matters that Mr. Seymour felt hurt at, but that is not a matter that would justify this writer in pinning upon it, as he has, these scandalous imputations.

Then the article goes on to say:

"We observe that in the last epistle the writer expresses some regret that the editor who fell into this (to a layman) very natural mistake, had not violated the privilege of Parliament thereby, and thus afforded to Mr. Digby Seymour the opportunity of laying the whole matter before the House. But why wait for a breach of

privilege? Honourable members have, before now, become the subjects of unjust suspicions, and have thereupon themselves moved the House for the appointment of a select committee of inquiry, with the full conviction that they would thus clear their scutcheons of blot. If Mr. Seymour be indeed enrolled, as he assures us, among the army of martyrs, why does he not take the same simple and straightforward course? Or if his native modesty prevents him from obtruding himself on Parliament, why should not some other M.P. clear the character of the House by moving for such a committee, and instituting such an inquiry? By all means let us have some investigation; let the chairman of the committee send for books, persons and papers; let the members sift the whole matter to the bottom, and when Mr. Digby Seymour has come out of the scrutiny, not merely as white as wool, but with refulgent crown of martyrdom to boot, let the House at once abolish the Benchers—and the Bar, too, if it lists—and let it further transmit the sufferer's claims to the canonizing council which is shortly to assemble under his Holiness, in order that St. Seymour of Sunderland and Southampton may be duly added to the calendar. Let it not be supposed, however, that we are prepared to record any approval of the conduct of the Benchers. We have not the slightest doubt that they acted in this painful business with perfect integrity, and with the best intentions; but it is impossible to acquit them of foolishness and error. In the first place, we are clearly of opinion that if they considered Mr. Digby Seymour guilty of even one of the charges brought against him, (and they admit that they did so,) they were bound to have disbarred him."

This writer is angry with the Benchers of the Middle Temple because they did not disbar him for that one matter which he admitted—for having acted honestly towards a solicitor to whom he was indebted, by saying, "I have no means with which to pay you, but I am willing to pay you in the only way in which it is in my power to do so, by returning you the fees you give me." The animus of this writer leads him to say that Mr. Seymour ought to be disbarred for that.

Then the article proceeds:

"Censure, however abjectly received when it was pronounced, was no adequate punishment for such an offender. Very recently, an unknown member of the Bar has been expelled from its ranks for offences certainly not greater than the charge which the Benchers say was proved against Mr. Digby Seymour. Is it right the public should suppose that while the whole severity of power is brought to bear against the weak, there is a dread of enforcing discipline in the case of a member of Parliament and a Queen's Counsel?"

What is the case to which they allude as one in which a gentle-



man had been expelled from the Bar "for offences certainly not greater than the charge which the Benchers say was proved against Mr. Seymour"? Will my friend explain to what case his client alludes? Who does he mean has been expelled?

"In the second place, it is quite clear that the judgment of the Benchers ought to have been screened immediately after it was pronounced," (that is, it ought to have been put up in the Hall,) "we cannot conceive what reason could be given for maintaining secrecy. And, thirdly, we are strongly of opinion that when Mr. Seymour challenged the publication of the evidence, it should at once have been given to the world. The honour of the Bar, and the dignity of the Bench demanded such a course, and we deeply regret that ill-advised counsels to the contrary have prevailed in the parliament chamber of the Inn. We cannot, however, concur in the idea that investigations before the Benchers into the conduct of every accused member of the Bar should necessarily be held in public. The adoption of such a rule would, we think, be a great evil. The jurisdiction of the Bench is exercised in what has been justly termed a domestic forum, and the nature of such a tribunal is essentially different from that of an ordinary court of law. To parade questions of etiquette, and even of morality, before the public, would be often unjust to the accused, and would add no security to the discipline of the profession. But we are alive to the mischief occasionally produced by the present practice, especially when an unscrupulous man makes capital out of the very privacy which has alone saved him from utter ruin."

Here the writer says, in effect, that the Benchers did right in not having this investigation public, while he at the same time gives to the public, not the evidence enabling them to judge for themselves, but his own verdict that Mr. Seymour ought no longer to be a member of the Bar. Then the writer says:

"Perhaps it would be well to give to the accused in all cases the *option* of a public hearing."

Then the last paragraph in the article is:

"In the proposal which has been made for a conjoint committee or council of the four Inns, to conduct inquiries of this kind, and to administer the discipline of the Bar, we most entirely concur. Such a measure would re-assure the public as well as the profession, and have a good moral effect; and as the institution of such a body would be only following up the precedent already set by the establishment of the council of legal education, which has worked admirably, we may hope that the Benchers will see the wisdom and expediency of making this step in advance without any further delay."

That, gentlemen, is the whole of the article of which Mr. Seymour complains. Just observe what it is. The character of a man at the bar is of course his fortune. Mr. Seymour had gone through the ordeal, painful enough to anybody, of answering charges, not of professional misconduct, but charges as to his conduct in other matters which had occurred years and years before. There had been an inquiry gone into which had occupied nearly, if not quite, eight months; he had been subjected to a very severe censure from the Benchers, though they did find that the charges which had been made against him were not proved, except in the one instance to which I have adverted, and after having gone through this ordeal, and after having been thus acquitted, the writer of this article takes upon himself, not to tell the world what the evidence was upon which the Benchers came to the conclusion at which they arrived, but to say in effect, "Although you (Mr. Seymour) have been acquitted you ought not to remain any longer a member of the Bar; you are one of the second class of Irishmen we have spoken of:— 'The Irish blackguard, swaggering, foul-mouthed, and shameless; the most insolent of upstarts, the most unblushing of swindlers;' 'one of the blackest sheep of the law;' enriched with a power of impudence and a fertility in fraud which defy all description." What justification can there be for that? The writer shelters himself under the name of the publisher, and will not disclose himself; but having got Mr. Seymour's explanation and protest before him, he dares to write this article and to have it printed in a book which will remain upon the shelves of libraries as long as law libraries last, as a record against Mr. Seymour. But that is not all; very often these books, when a death has taken place, find their way to the bookstalls in the Metropolis; and for all time to come, in every law library, in every club, at bookstalls and in other places, this article will remain as a permanent indictment against Mr. Seymour, although, after undergoing the painful ordeal to which he was subjected, he was acquitted by the Benchers of the Middle Temple. Do not let it be supposed that I mean to complain of the manner in which that learned body did the duty they had to perform; but it is nevertheless hard upon Mr. Seymour that he should have been called on when that step in advance was obtained by him, which every man in the profession looks for sooner or later, to have charges raked up against him which must have been known seven or eight years before. Mr. Seymour brings his action; a letter is written to Mr. Butterworth on the part of Mr. Seymour, and the only answer that is given to that letter is a reference to Mr. Butterworth's



solicitor. There is no offer of an apology, or retractation, or anything of the sort. The mysterious person who is behind Mr. Butterworth does not wish to do anything of the kind. He does not apologise, and when he is challenged he shrinks from putting on the record a plea of justification. Whoever he may be, he felt it necessary to tell the public, or the profession, why he did not justify the libel. Let us see what reason he gives in the next number of his Magazine, for not justifying it. Mr. Seymour, in his declaration sets out, I believe, the whole of the libel, and says, "I charge you with having meant to say of me that I am a 'black sheep of the law,' 'an Irish blackguard, swaggering, foul-mouthed, and shameless—the most insolent of upstarts, the most unblushing of swindlers;' 'enriched with a power of impudence and a fertility in fraud which defy all description.'" Nobody can doubt that the defendant could sustain a plea of justification if he could prove that Mr. Seymour was what he there describes him to be. Now what is the writer's apology for not having pleaded a justification? In the very next number of this periodical, which was published in August, we find this :

"Mr. Digby Seymour has thought fit to commence legal proceedings against the LAW MAGAZINE in consequence of the article which appeared in our last number. During the whole period of the existence of this Magazine, it has commanded, we believe, the respect and confidence of the profession," (so much the deeper is the sting contained in the libel,) "and Mr. Digby Seymour is only the second person who has ever imputed to those who conduct it, or to its eminently respectable publishers, that its pages have been made the vehicle of libel. We say the second person, because we are aware that Mr. Edwin James, in that appeal to the New York public on which we have commented elsewhere, has made a similar imputation against us, and attributed to our personal malice and propensity for libel no small share of his evil reputation. We are content to leave the reclamations of both these gentlemen to the deliberate judgment of the Bench, the Bar, and the whole body of the profession; and we shall place the article in question confidently in the hands of a jury, as a fair and reasonable comment on notorious facts, written with the same knowledge of the circumstances as the whole public possessed, mis-stating nothing, suppressing nothing, and consisting in a great degree of materials supplied by Mr. Digby Seymour himself."

What this writer can have in his head, or what sort of mind he can possess, which can bring him to the conclusion that the article he has written is "a fair and reasonable comment upon notorious facts," I am at a loss to know. Can it be said that when a man is called a "blackguard," when it is said that he is unfit to be at the bar, that he is a "black sheep of the law," that he is "the most unblushing of

swindlers," and "enriched with a power of impudence and a fertility in fraud which defy all description," that those are notorious facts? What are the facts? Why, that Mr. Seymour, about seven years after the transactions in question had occurred, was summoned before the Benchers of his own Inn on charges which the Benchers, after investigation, found were not proved, but with respect to which they administered a reproof to him, against which he protested; and upon that the writer of this article thinks fit to apply to him language such as that which you have heard, charges him also with having bought his rank by corruption as a member of Parliament, and then urges before you that what he has said is nothing more than a justifiable comment upon notorious facts. Observe, too, how the writer puts Mr. Seymour side by side with other persons whose names are mentioned or who are referred to in this article. I do not know whether my friend is instructed now to contend that this article is not a libel, that it is not defamatory of Mr. Seymour at all, and that he had a perfect right to publish it. If he should be, I think you will come to a different conclusion. Then they go on to say:

"We should hardly have thought the matter worth any notice in these pages, had it not been for the statements recently made by Mr. Digby Seymour, in the House of Commons, and at Southampton, in reference to the action he has commenced against our publishers. Mr. Seymour has been repeatedly challenged to bring his whole case by appeal before the Judges, and thus satisfy the public and the profession that the charges which have been made against him are unfounded."

Gentlemen, this fact I may state, and I will prove to you, that those who advised Mr. Seymour, did advise him (whether rightly or not is not the question here) that no appeal lay to the Judges. Their opinion was that the visitorial powers of the Judges could only be exercised in cases in which a person's status as a barrister was affected by the judgment, and that had Mr. Seymour been disbarred, he would have been better off than with such a judgment as that which was pronounced by the Benchers, because then he could have appealed to the Judges. Those who advised Mr. Seymour, whether they advised him rightly or wrongly, certainly entertained that opinion. Then they say:

"This course is the more called for, as Mr. Seymour holds a judicial position as Recorder of Newcastle, and it is a thing unheard of in this country that any man should exercise the office of a criminal judge, in respect to whose character grave imputations remain unrefuted. In order, apparently, to avoid the course which we should have

supposed any man desirous of vindicating his character would have eagerly followed, Mr. Digby Seymour alleges that he has already taken steps to prove his innocence before a jury; meaning by such steps, the proceedings commenced against the publishers of this Magazine. We must disabuse the public of the idea intended to be conveyed by Mr. Digby Seymour. It is not possible that the judgment of the Benchers on the transactions of Mr. Digby Seymour can be reviewed, or that any definite opinion on those transactions can be arrived at, by means of an action for libel against our publishers. We find that the declaration in the action sets out the whole of our article, without any specific innuendo as to any portion or sentence; thus, as every lawyer is aware, practically precluding any other plea than that of the general issue. It is clear, therefore, whatever he may assert to the contrary, that the object of Mr. Digby Seymour in this action is not to challenge proof of any of the specific accusations against him; that it is a proceeding for other reasons against a private individual; and that an investigation on public grounds, and in a way to bring out the whole truth, has still to be demanded. We know that we are speaking the opinion of the heads of the profession, when we say that such an investigation is absolutely necessary to maintain the purity of public justice, and the honour of the Bench and Bar. We ought to add, that we have perused a statement of his case drawn out by Mr. Digby Seymour, and printed for 'private circulation.' The only comment we have to make at the present moment is, that, in our opinion, the defence does not satisfactorily meet the allegations, although, as confessed by the author, it fails to set out the whole of the evidence against him."

That is worse than all; there is the same virulent spirit manifested there that is found in the first article. He further says that which any lawyer ought to be ashamed of writing—that you cannot plead a justification to this declaration. I never heard such a monstrous statement. They say: "You have set out the whole of our article without any specific innuendo." Every lawyer knows what that means. If a man publishes a libel of you and uses terms which are ambiguous, and the meaning of which Judges do not judicially know, and you do not know without an explanation, you then have to put into your declaration, an explanation of the meaning of those words; but where the libel itself points to the person, and where it is unambiguous as this libel is, where would you find any pleader who has practised for an hour say it is necessary to introduce the explanation in the declaration in an action for libel; or if there were any difficulty about it, would he not at once go to a Judge in Chambers, and ask to have the matter set right by allowing him to plead a justification? What he says here is really a mere flimsy

pretence to cover his inability to justify that which he has asserted. He finds he cannot do it; it is not in his power to prove the truth of a single word he has written. Then again, he says: "Mr. Digby Seymour has published now the evidence, or the greater portion of the evidence, brought forward against him. We have read it, and we do not think that his defence is made out." So that, whereas the Benchers themselves, after an investigation which lasted nearly eight months, have said that the charges against Mr. Seymour are not proved; this writer says, "In my opinion, Mr. Seymour's defence is not made out." That, I think, proves what I have said before:—that the object of this writer has not been to correct any irregularities in the Bar, not to promote the public benefit, not to purge any body that is supposed to contain unhealthy members, but to attack Mr. Seymour, for some reason or other which is not apparent—to expel him from the profession—to do that which the Benchers would not do—to hold him up for ever as a person who is unworthy to be ranked among the gentlemen of the Bar.

LORD CHIEF JUSTICE COCKBURN:—Do I understand you to say that the evidence before the Benchers has now been published?

Mr. LUSH:—Yes, my lord.

LORD CHIEF JUSTICE COCKBURN:—I was not aware of that.

Mr. LUSH:—They say: "We ought to add, that we have perused a statement of his case drawn up by Mr. Digby Seymour, and printed for private circulation."

LORD CHIEF JUSTICE COCKBURN:—I understood you to say that the evidence had been published.

Mr. LUSH:—It was published in that way; it was first printed for private circulation only, certain parties whose names appeared in it having given Mr. Seymour notice not to publish it; but since then, they have withdrawn that notice, and now anybody may have it.

LORD CHIEF JUSTICE COCKBURN:—I do not know that it affects the case at all, but for my personal satisfaction perhaps you will tell me, whether it is published in the sense of being published by a bookseller, so that anybody may go and buy it."

Mr. LUSH:—No, my lord, I think not; but the restriction as to private circulation is withdrawn.

LORD CHIEF JUSTICE COCKBURN:—So that now Mr. Seymour may give it to whom he pleases.

Mr. LUSH:—Yes, my lord.

LORD CHIEF JUSTICE COCKBURN:—When we use the word "published," we use it rather in contradistinction to the word "circulated."

Mr. LUSH—The comment here is “We have read it through: and, in our opinion, the defence does not meet the allegation.” This, gentlemen, is the case that I have to present to you on behalf of Mr. Seymour. He has had to go through a most frightful ordeal; in an eight months’ investigation he has been called upon to answer for and explain his conduct in reference to matters which occurred years and years ago—matters unconnected with his profession, but long known to those who brought them forward in the shape of charges against him—and then some one (whether the person who originally made the charges or not I cannot tell) has thought fit to write and publish in this Magazine, which is to be the depository of all that concerns the law, an article such as that which I have read, charging Mr. Seymour with being a person utterly unfit to belong to any society, much less to belong to the Bar, where undoubted probity and integrity are most essential. Mr. Seymour having advanced in his profession by the regular gradations, and having attained a position which gave him a perfect right to calculate on becoming prosperous, if not on making his fortune at the Bar, has been met by an attack such as that which has been made upon him in the article of which he complains, and when he brings his action and challenges the writer or the publisher to prove the truth of the charges that have been made against him, and takes the very first opportunity that is presented to him of having these matters inquired into by a jury, he is met simply with a plea of not guilty. What do you say to a party who publishes such a libel as this and then shrinks from justifying it and proving its truth? What damages do you think Mr. Seymour ought to have? It is not that Mr. Seymour wants to put money into his pocket, that is not his object in coming before you; we all know, however, that the public look in these cases to the sum the jury give as affording an index to the impression made upon their minds; and when the proceedings of this trial come to be read, I hope it may be seen that the evil and the antidote go together, and that the damages awarded by you have been such as to show that in your judgment there was no reasonable pretence for writing this article of which Mr. Seymour justly complains.

Mr. KEANE:—The publications are admitted, my lord.

Mr. LUSH:—And the letters.

Mr. KEANE:—And also the letter to Mr. Butterworth, and his answer referring us to his solicitor.

**WILLIAM DIGBY SEYMOUR, Esq., Q.C., M.P., sworn, examined by Mr. KEANE.**

Q. You are the plaintiff?

A. Yes.

Q. I believe you are one of Her Majesty's Counsel, and a Member of Parliament for Southampton?

A. I am.

Q. Your father was a clergyman of the Established Church in Ireland?

A. He was.

Q. You were educated at Trinity College, Dublin?

A. I was.

Q. And graduated with honours?

A. Yes.

Q. You were called to the bar at the age of twenty-three, by the Middle Temple?

A. Yes.

**LORD CHIEF JUSTICE COCKBURN:—**When were you called to the bar?

A. In June, 1846.

**Mr. KEANE:—**Did you practise on the Northern Circuit?

A. Yes.

Q. And went some of the sessions there?

A. Yes. Newcastle, Durham, Northumberland, and subsequently, Leeds and the East Riding.

Q. And you had a very large business at those sessions?

A. Yes, I may say so.

Q. And were you entrusted with Crown prosecutions there—or with some of them?

A. Yes.

Q. In what year were you first elected a Member of Parliament?

A. At the general election of 1852—for Sunderland.

Q. You were afterwards appointed Recorder of Newcastle-upon-Tyne—in what year was that?

A. In the beginning of 1854; I say the beginning of 1854, but I would rather say 1854—for at this moment it escapes my recollection exactly when it was.

Q. Do you recollect your first hearing of the vacancy in the Recordership—how long it was before you were appointed?

A. At this distance of time, I cannot state how long it was before my appointment.

Q. Are you in any way able to connect your appointment to the Recordship with any vote of your own in Parliament?

A. Certainly not; I know it was said that it had some relation to a vote of mine on a public question, but I had voted previously in favour of that measure before the Recordship was known to be vacant; and I had addressed my constituents at Sunderland on losing my seat, and in answer to a question which was put to me publicly, whether I would support that measure, I said "Yes." At that time I had no idea that the Recordship was likely to be vacant, and my appointment was never in any way connected with political matters. I got a letter from Sir George Hayter.

Mr. SERJEANT SHEE :—We cannot have that.

Mr. KEANE :—You were not re-elected for Sunderland, but you were afterwards elected for Southampton?

A. I was not re-elected for Sunderland.

Q. Some years afterwards you were elected one of the Members for Southampton?

A. Yes, in the general election of May, 1859.

Q. Did you continue to be in extensive business upon the Northern Circuit and in London, in the interval between your resigning the seat for Sunderland and being elected for Southampton?

A. Certainly; my practice had steadily and considerably increased, both in criminal and in civil business.

Q. You were appointed Queen's Counsel in the Palatinate of Lancaster; in what year was that?

A. At the summer assizes of 1860, I was called within the bar of the County Palatine of Lancaster by Mr. Baron Martin.

Q. And I believe Baron Wilde was the other Judge?

A. Yes.

LORD CHIEF JUSTICE COCKBURN :—When was that?

A. At the summer assizes in 1860.

Mr. KEANE :—Baron Wilde was the other Judge travelling that Circuit, I believe?

A. He was; and the appointment received his express sanction.

Q. Both those Judges had been formerly with you on the Northern Circuit?

A. They had.

Q. Had you, in the spring of 1861, charge of a Bill relating to the Admiralty jurisdiction?

A. I drew the Bill, and brought it in myself to the House of Commons.

LORD CHIEF JUSTICE COCKBURN :—A Bill for what?



A. The last Admiralty Reform Act.

MR. KEANE :—In the early part of 1861?

A. Yes.

Q. Had that Bill passed the House of Commons before you were appointed Queen's Counsel generally?

A. It had ; it had gone up to the Lords ; it had gone up the previous session.

Q. That Bill passed the Commons?

A. It passed the Commons and went up to the Lords, and Lord Brougham and Lord Cranworth expressed themselves very strongly in its favour.

LORD CHIEF JUSTICE COCKBURN :—Then it was in the session of 1860?

A. In the session of 1860 it passed the Commons, and went up too late to pass the Lords.

MR. KEANE :—In which House was it re-introduced in the session of 1861?

A. I gave notice to introduce it in the House of Commons, but I received a letter from the late Lord Chancellor Campbell to the effect that he approved of the Bill, and I consented to its becoming a Government measure, and to its being introduced in the House of Lords ; I waived my notice, and the Bill was subsequently passed, and is now the law.

Q. Subsequently to that, did you receive an intimation that you would be appointed a Queen's Counsel?

A. I received that intimation within a week afterwards.

Q. And you were appointed in 1861—you have both the letters, I believe?

A. Yes.

Q. You were, I believe, appointed when a large number of our friends were appointed in the spring of 1861, just before the Circuit?

A. Yes. That (producing it) is the Chancellor's letter, dated February 14th ; and that (producing it) is the notification of my getting rank, dated February 19th.

Q. A large number of the Bar were then appointed?

A. A large number of the Bar were then appointed, several of them being my contemporaries on the Circuit ; we had been the sessions together and had fought the battle honourably for many years.

Q. So far as you know or are aware, was your appointment the result of any bargain or of any political pressure emanating from you on the part of any person about the House?



A. Certainly there was no bargain ; and as to political pressure, I think it would have fallen hardly upon me if I had been passed over, considering my legal rank at Liverpool ; I was already Queen's Counsel, in effect, for half of my Circuit.

LORD CHIEF JUSTICE COCKBURN :—You say there was no political pressure ?

A. None whatever, directly or indirectly ; never.

Mr. KEANE :—Has it ever been conveyed to you, in any way, that Lord Campbell expressed any regret at having appointed you to be one of Her Majesty's Counsel ?

A. Until I saw it in that article I never had any reason to suppose so.

Q. I think after that you went down to Southampton and referred to some proceedings which had taken place before the Benchers of the Middle Temple ?

A. Yes, after that.

Q. And you made the address to your constituents, part of which is published in the article complained of ?

A. Yes.

Q. Was it the fact that you found placards all over the town when you got there, referring to those proceedings ?

A. Yes ; when I got to the railway station there were a great number of them there, and they were handed to my friends who went to the meeting. There was something also besides the placards ; there was a written copy of the judgment of the Benchers, with the particulars of the voting in the Council Chamber, and the persons who had voted for and against those condemnatory observations upon me.

Q. Were they all circulating in Southampton ?

A. They were all circulating industriously in Southampton.

Q. It is said that you received the intimation from the Bench of their so-called "merciful view" of your case, "with professions of gratitude, tearful, if not abject in their nature." Is there any foundation for that ?

A. That is an entire perversion of what occurred. I heard the judgment, as we will call it, read over to me when I came into the room ; when it was over, I think I can state as nearly as possible what I said—certainly I can state the substance of it. I said that I thanked the Benchers for their finding with regard to the principal charges. I then referred to their observations on Robertson's case ; I said the Benchers had thought proper to twit me with what they called "romantic generosity ;" I said that from

the hour when that event unfortunately took place, until then, instead of being a romance, it had been a millstone round my neck, a most unhappy fact; but that I was as generous as I claimed to be. I then referred to Parker's case, and said I had been placed in the unhappy position in which I had been placed there because I had consented, on account of his illness, to set him free from the transaction; and I added that, although perhaps care had somewhat aged me, I believed I was still the youngest man in that room, and that many years would not roll over before they would be prepared to admit that they had done injustice to my motives and my character. I may have spoken with feeling, but I certainly shed no tears.

Q. You are not conscious of having behaved "abjectly"?

A. If I acted in an abject spirit I was not conscious of it.

Q. The protest which has been read, I think you sent in on the 3rd February, 1862; it bears that date; you sent the protest on the day it bears date?

A. Yes.

Q. What was the date of the judgment?

A. In point of fact, I wrote the protest, and it was copied and lying in my chambers before I went to Southampton, and after I came back I added the postscript and sent it.

Q. What was the date of the letter?

A. The 24th February, I think.

Mr. LUSH:—The protest is the 3rd.

A. The judgment was in January.

Mr. KEANE:—I want to know when you got it; do you remember the date?

A. I can tell you if my clerk is in court; I received it on the 23rd January.

LORD CHIEF JUSTICE COCKBURN:—Received what?

A. A copy of the judgment.

Mr. KEANE:—When did you go to Southampton?

A. I think it was the 3rd February.

Q. The date of the protest I see is the 3rd of February.

A. Then I had come back from Southampton.

Q. But it had been composed before?

A. It had been left in my chambers. I had written the protest all except the postscript before I went to Southampton, and when I came back from Southampton I added the postscript, and sent it.

Q. What is the date of the postscript?

A. February 6th; I think my speech was delivered on the 4th February, and I returned on the 5th or 6th.

Q. I think I did ask you whether there had been any promise of a vote by you in respect of a silk gown?

A. Certainly not. It was neither proposed nor, I need hardly say, was it suggested; it was neither the one nor the other.

LORD CHIEF JUSTICE COCKBURN:—You were at that time a supporter of the Government generally?

A. Yes; I had been previously in the House.

Mr. KEANE:—There is a book which has been published by your authority; I believe you had notice from certain parties not to allow it to be circulated among the public on account of their names being mentioned in it?

A. Yes, one or two brokers and other gentlemen said they thought it might be prejudicial to them, unless the whole matter was before the public, to have their names connected with the thing, and they asked me in the first instance not to publish it.

Q. Was that prohibition or request on their part afterwards withdrawn?

A. Yes; I pressed so strongly that they should not insist upon it that they consented to withdraw it.

LORD CHIEF JUSTICE COCKBURN:—When was that?

A. That was, I think, in the month of April.

Mr. KEANE:—And after that you sent copies for private circulation.

A. After that was withdrawn I sent copies to nearly all the members of the House of Commons of any note or position, to a great many members of the House of Lords, and to a great number of the Bar.

Q. And to the clubs?

A. I think so. I gave copies, I know, to friends, who said they wished them for the clubs. I did not, I know, send them direct to the clubs.

CROSS-EXAMINED by Mr. SERJEANT SHEE.

Q. I presume I may take it that all these papers which are printed in the article are correctly printed as they appeared in the *Times* newspaper?

A. Yes, I think so.

Q. Your speech, your protest, and your letters?

A. Yes.

Q. You joined the Northern Circuit in the year 1846?

A. Yes, very soon after I was called.

Q. At that time the leaders of that Circuit [were, I think, my learned friend Mr. Knowles, Sir David Dundas, the late Mr. Matthew Talbot Baines, and Mr. Martin, afterwards Baron Martin?

A. I think so; I know I got my red bag from Mr. Talbot Baines.

Q. There were at that time also on the Circuit, I believe, four graduates of the university at which you had graduated—Mr. Crompton, now Mr. Justice Crompton, Mr. Hugh Hill, afterwards Mr. Justice Hill, Mr. Martin, now Mr. Baron Martin, and Mr. Serjeant Murphy?

A. I can only speak of my own knowledge with regard to Serjeant Murphy; he was a scholar and an eminent member of the University of Dublin.

Q. Do you not know of the others?

A. Not of my own knowledge. I have not the least doubt of it if you put the question to me.

Q. I believe that the members of the Northern Circuit at that time were about 207 in number?

A. Including the local Bar, I have no doubt of it. I believe now they exceed 300.

Q. Of whom more than a dozen were Irishmen?

A. I cannot really say that.

Q. Were there not many Irishmen?

A. There were several, but I do not know that there were a dozen,—I should say there were, I dare say there were.

Q. Baron Martin was one?

A. I have no doubt that you put the question having considered it, and I would not like to say there were not a dozen; but a dozen sounds more than come to my recollection. I cannot recollect a dozen, prominent members of the Circuit.

Q. There were several?

A. There were several. There was Mr. Baron Martin, Mr. Serjeant Murphy.

Q. Mr. Hugh Hill, Mr. Seymour Fitzgerald?

A. He was not upon the Circuit, I think, when I joined it.

Q. Yes—you will find him in the Law List for 1846.

A. Not on the Northern Circuit. There were many men there who may have been called and admitted, but who never practised on the Circuit; he certainly never practised to my knowledge. I never saw him in court on the Northern Circuit.

Q. You say that, from the first, you were made a mark on that

Circuit of "a cruel and jealous opposition, and a determined effort to keep you down if it were possible, because you were an Irishman"?

A. Yes.

Q. Upon your oath is that true?

A. I must first answer you with regard to the words "from the first." If you ask with reference to the time when I joined the Circuit, I think, taken with mathematical exactness, my words convey more than I meant to say, or more than I should be justified in saying; but I do say that very early in the course of my practice on the Circuit, I was, on the part of certain members of that Circuit, made the subject of what I considered a jealous and unfair opposition, and my candidature for Sunderland revealed circumstances and scenes connected with it, that all the Northern Circuit are aware of.

Q. Is it true that you were made "from the earliest time, the mark of a cruel and jealous opposition, and a determined effort to keep you down, if it were possible," because you were an Irishman?

A. On the part of some members of the Northern Circuit, and taking its date from the time when I began to take a prominent position on my Circuit, I consider myself justified in saying so.

Q. Then it is not true that from the "earliest time" it was so?

A. You put the word "from the first:"—"from the earliest time," yes; but not "from the first." I only correct the words which you used, "from the very first."

Q. You say here, "I came among the members of the Northern Circuit with that misfortune which my countryman Grattan has described; I came 'with the curse of Swift upon me:' I was an Irishman. I was made, from my earliest time, the mark of a cruel and jealous opposition, and a determined effort to keep me down, if it were possible." Will you undertake to say that that is true?

A. I undertake to say there was sufficient to justify that statement being made by me. It is one thing, Serjeant Shee, to utter in the heat of a public meeting a sentiment which you pick out, like that which you have now read, and it is another thing when you call upon me on my oath to say whether, having regard to the exact words I am reported to have used, I will pledge myself to them. I say this—upon oath, I had sufficient facts and had looked back at sufficient conduct on the part of some members of my Circuit to justify me in attributing it to that source, for I had no other, and I knew of no other to which to refer it.

Q. You say "on the part of some members"?

A. Yes.

Q. Is not this an imputation upon the body, and was it not meant, when you said it at Southampton, as an imputation upon the body of the Northern Circuit?

A. Well, the body of the Northern Circuit, like other bodies, are often guided by the will of perhaps a few who may have more influence than others, and may tone very much the conduct of the juniors. Juniors do not like to give offence to seniors, and go very much along with them. When I first started politically for Sunderland, in 1852—

LORD CHIEF JUSTICE COCKBURN:—Do not let us go into that;—the question is, whether you intended to convey by that general language an imputation on the whole body of the Northern Circuit?

A. My lord, I meant to convey that I had been the subject of what I considered unfair representation and jealousy on the part of members of the Circuit, which I thought had not been sufficiently condemned in certain instances by the body, and which I could refer to nothing else but the fact of my being an Irishman.

Mr. SERJEANT SHEE:—Then this statement was not true?

A. My statement was substantially true.

Q. That you had been made the mark, “from your earliest time, of a cruel and jealous opposition, and a determined effort to keep you down, if it were possible,” because you were an Irishman?

A. Well; if every word spoken by you or by me were taken down by the plummet and were read with mathematical accuracy, it might be capable of being observed upon.

Q. Pardon me—

A. In the mathematical sense of those words they convey more than I meant them to convey.

Q. In plain common sense—do they not convey a most disgraceful imputation upon the body of the Bar of the Northern Circuit?

A. They convey a complaint on my part. I was stung, and spoke under the feelings of the moment.

Q. Do they not convey, and did you not mean them to convey, that the body of the Northern Circuit had been influenced towards you by feelings unworthy of men of honour and gentlemen?

A. I meant to convey that such feelings had operated against me on the Circuit.

Q. Now, was it true of the body of the Circuit?

A. In the sense in which I then expressed it, and in which I meant it, it was true.

Q. Were not the leaders of the Circuit—at all events, when you

first joined it—entirely free from any such feeling as far as you were concerned?

A. So long as the leaders were not taken from those with whom I was brought more immediately in professional contact; so far as the leaders were concerned, I can have no complaint against them.

Q. Then it was not when you first joined?

Mr. LUSH:—He has not said so.

Mr. SERJEANT SHEE:—From the earliest moment?

A. No.

Q. I do not wish to misrepresent you; you say, "I was made from my earliest time," that is, time on the Northern Circuit?

Mr. LUSH:—He says not.

Mr. SERJEANT SHEE:—Is not that what you meant?

A. I of course spoke looking back over a lapse of years. I did not mean to say from the time I first joined the Circuit; I did mean from the time when I began to take an active position on the Circuit, and more especially when I began to get into business, and made myself politically obnoxious to some members of the Circuit.

Q. Do you mean to say you meant to represent that from the time you got business you were "the mark of a cruel and jealous opposition" because you were an Irishman?

A. I mean to say that I was made, as long back as I can recollect, from no other motive or cause that I am aware of, the butt of insinuations and of jokes and ridicule—for instance, jokes at the grand court, and in other instances, by men who were under the influence of the leaders of the Circuit; if you press me for my reasons, I must give them to you.

Q. Jokes at the grand court? I have been made great fun of myself there!

LORD CHIEF JUSTICE COCKBURN:—There are always jokes there.

A. Pardon me, my lord; but jokes that cut at character are generally presumed to be absent from such places; and in my case they were singularly present, as the records of the Circuit will show.

Mr. SERJEANT SHEE:—Am I to understand that when you uttered these words, you did mean to impute to the Circuit dishonourable and disgraceful conduct towards you because you were an Irishman?

A. If you mean—did I impute it to the body of the Northern Circuit—I did not. There are on that Circuit as honourable men as ever breathed, or ever belonged to any profession, and I believe that I have on that Circuit as warm and generous friends as ever existed; to accuse the whole Circuit, therefore, I did not mean, and if my

words convey so severe an attack on the whole body of the Northern Circuit, I bitterly regret it. I had before my mind then the recollection of conduct which I thought the Circuit had not, as a body, sufficiently condemned—if they had not too long encouraged.

Q. Had your conduct been before the Circuit at all as a matter of inquiry when you made this speech? We find that it was afterwards the subject of an inquiry before a committee of the Bar of the Northern Circuit.

A. Yea, I think so—when I made the speech at Southampton.

Q. Had it?

A. Certainly. Yes, it had.

Q. I believe the transactions which were the subject of inquiry before the Benchers of your Inn, and afterwards before the committee of your Circuit, occurred in 1853-4 and 1855, did they not?

A. 1852-3. Yes. 1853-4 and 1855.

Q. After you became a Member of Parliament?

A. After I became a Member of Parliament. Did you say matters that were the subject of inquiry before my Circuit?

Q. Before the Benchers and before a committee of your Circuit?

A. The only question before the committee of my Circuit was as to the circumstances under which I had consented to give judgment in an action which was brought against me by Mr. Parker, in which I had the benefit of eminent advice.

Q. The only case that was brought before the committee of your Circuit was what is called Parker's case?

A. The settlement of that action; not the case, but the settlement of that action. It was brought before them. The case was never tried, because, after the report by the Benchers, the committee broke up without allowing me to call witnesses. They heard my statement; I implored them to give me a week to finish my case, but they would not do so, and they reported against me, hostilely, without allowing me to conclude my case. They heard three gentlemen against me, two of whom gave evidence behind my back, and they would not allow me to call my witnesses. Mr. Forsyth, Mr. Serjeant Wheeler, and other gentlemen of the Northern Circuit implored the committee not to go on until I had completed my case, and thirty members of the Northern Circuit refused to vote for my expulsion from the mess; which was done upon that report.

Q. Was your expulsion from the mess actually pronounced?

A. I retired from the mess; when I found that the committee were going to publish their report before my case was closed, I sent in my resignation, and then, certain gentlemen, not content with



my resignation, gathered together a sufficient number at York to move for my expulsion.

Q. Was the expulsion pronounced before you wrote that letter of the 3rd April—which is set forth in page 182 of this article—to the *Times* newspaper ;—that letter in which you say, “ A statement has appeared in the leading columns of one of your contemporaries of this day ”—“ that I have been expelled from the Bar of the Northern Circuit ” ?

A. Yes, from the Bar of the Northern Circuit. I recollect that there was a rumour that I suffered very much from—that I was not going the Circuit any more. I suffered very much from that the last time.

Q. I want to know whether at the time when you wrote that letter in which you said you had not been expelled from the Bar of the Northern Circuit—you had been expelled from the Bar mess of the Northern Circuit ?

A. No doubt.

LORD CHIEF JUSTICE COCKBURN :—I thought you said you retired from it.

A. Yes, I retired ;—I sent in my resignation to the mess, grounding it upon the fact of this report being circulated before my case was closed, and I added just now—though possibly your lordship did not catch my words—that notwithstanding that, a number of the Bar met and the committee appealed to them to support them,—as they were their committee they called upon them to support them, and of course called on them to adopt it. Thirty members of the Bar (I am obliged to speak from information here) refused to vote ;—the rest did expunge my name.

Mr. SERJEANT SHEE :—Where was that decision pronounced ?

A. It was where comparatively a small number of the Northern Circuit were assembled. It was done at York. It was not at Liverpool. I do not wish to offer my own opinion, but I believe it would not have been done at Liverpool.

Q. Now we are upon the point of this professional jealousy, I believe I may ask you with confidence whether there has ever been any opposition to you generally at the Bar—on the ground of your being an Irishman—either here at Westminster or anywhere else ?

A. Well, there is a good deal, perhaps, in that word “ Irishman.” A great deal of a man’s zeal and energy—the very qualities which make a man successful in his profession—may spring from his being an Irishman.

Q. Do you not know that on the Circuit, there are plain manifest

Irishmen who are very well received and exceedingly well liked at the Bar?

A. But I think I have been for its faults, and for some of its good qualities too, perhaps, more pronounced as an Irishman than some of those gentlemen to whom you refer, who did not come hot from the university to battle for the honours of the Bar, as I did.

Q. Do you not know that, in point of fact, there is no prejudice at the Bar against Irishmen?

A. Oh with the Bar as a body I believe there is none. I never accused the Bar.

Q. You say in the same passage of your speech: "But, gentlemen, their efforts failed. Step by step I vanquished one difficulty and another, and won, by degrees, the honours which I have received and the dignities which I hold. I obtained a lead at my sessions; I obtained the best Recordship but one on the Northern Circuit." At the time you obtained the Recordship of Newcastle-upon-Tyne, there were many members of your sessions who were your seniors, were there not?

A. My seniors in age.

Q. Your seniors at the sessions, in standing?

A. Certainly there were.

Q. Were you not one of the juniors?

A. I was one of the leaders in practice.

Q. That is not the question, you know. Were there not many gentlemen practising at those sessions much your seniors in standing at the Bar?

A. If you ask me whether there were many gentlemen in practice.

Q. Practising?

A. Attending the sessions, and occasionally holding an odd-stray brief, there were several who were my seniors; attending the sessions and doing practice, in the sense of doing a leading practice, I was on a par with any of them.

Q. You say you were on a par with any of them?

A. On a par at the sessions, and more than on a par at the assizes. I should say that at the assizes, I had ten times more business, civil and criminal, than any of those attending the sessions.

Q. But still there were a great many who were your seniors in standing?

A. Not many.

Q. Eight or nine, were there not?

A. Several of my seniors remain at the sessions now who were my seniors then.

LORD CHIEF JUSTICE COCKBURN:—What was your standing at that time?

A. I was of eight years' standing; I think the Act of Parliament requires three years in the case of a Recordership—either three or five.

LORD CHIEF JUSTICE COCKBURN:—I do not think that three years is the limit according to the statute.

MR. SERJEANT SHEE:—I believe it is five; I am not sure.

THE WITNESS:—I am very anxious to be correct for every reason, and I wish upon this point to be correct. When I was Member for Sunderland, in 1852, having to interfere sometimes in the nomination of magistrates, and it happening on one occasion, I recollect, that some of my own committee were on the jury I addressed, I thought it right, from motives of delicacy, to leave those sessions, and I exchanged my Newcastle Sessions and went to Hull and the East Riding, but I obtained the lead there before I obtained my Recordership.

Q. You say you obtained the best Recordership but one on the Northern Circuit. Were the emoluments of the office considerable?

A. £250 a year; as Recorder I am Judge of a local court, to which there are fees attaching, amounting to about £50 a year, so that it is worth altogether about £300.

Q. The jurisdiction is civil as well as criminal?

A. Yes; the business has much increased.

Q. And the jurisdiction is in extent very considerable; it extends to the whole town of Newcastle (a very large town), and part of the district round it?

A. It does; perhaps you will allow me to say, with respect to the Civil Court, that I never knew any business in it before I became Recorder; but I paid a good deal of attention to it, and now there are a great many causes at every sessions, and I believe it has given great satisfaction in the town.

Q. When did you learn that that Recordership was vacant?

A. That I cannot answer.

Q. Was it in the month of December, 1854?

A. I cannot remember; I recollect that it was in the first instance offered to Sir William Atherton, (then Mr. Atherton,) and I remember his telling me that he had great doubts whether he would go down for re-election to Durham.

Q. Was it in December, 1854, during the sitting of Parliament?

A. It was during the sitting of Parliament.

Q. In December, 1854?

A. If you have anything to assist me I shall be glad.

Q. Was it not after the introduction into the House of the Foreign Enlistment Bill?

A. Certainly it was.

Q. Had you spoken on the Foreign Enlistment Bill before you heard of the vacancy in the Recordship of Newcastle?

A. I think I was aware that it had been offered to Mr. Atherton at that time.

LORD CHIEF JUSTICE COCKBURN :—That is not the question—the question is whether you had spoken on the Foreign Enlistment Bill before you heard of the vacancy in the Recordship of Newcastle-upon-Tyne?

A. No; I think I heard of its being offered to Mr. Atherton before I spoke, because I spoke upon the second reading.

Mr. SERJEANT SHEE :—You spoke twice upon it, did you not?

A. Ah, that is the reason why I paused; I believe I spoke upon the first reading, and voted. I was not aware, then, on the first occasion that it was vacant.

LORD CHIEF JUSTICE COCKBURN :—You voted upon the first occasion?

A. On the introduction of the Bill: and at Sunderland when I went down, I recollect, afterwards, a question was put to me about it, which now recalls the matter to my mind.

Mr. SERJEANT SHEE :—Then you were not aware of the vacancy when you spoke on the first occasion?

A. I will answer this, which I am perfectly correct in answering; I gave my adhesion to that Bill by vote; I either voted or paired, or spoke and voted. I cannot at this time say which, but I gave my adhesion, and expressed my intention to vote, and pledged myself to vote for it, before I heard or dreamt that the Recordship was vacant.

Q. Did you apply for it?

A. I think I was asked to send in my standing.

Q. Then I suppose you applied?

A. I do not know whether you call it an application.

Q. There is no harm in applying; many people apply for Recordships. Did you apply for it? Nobody gets it who does not, I believe, particularly when it is worth £250 a year.

A. I cannot at this moment say.

Q. Come, come, Mr. Seymour?

A. I think I was asked to send a statement to the Home Office, of my standing.

LORD CHIEF JUSTICE COCKBURN :—Did you apply?

A. I think I was advised to do that ; I think I was advised and told that I ought to send a statement of my standing.

Mr. SERJEANT SHEE :—You could not have needed much advice on that point. Did you ask anybody for it by word of mouth ?

A. Except by that application I did not ; I did not by word of mouth.

LORD CHIEF JUSTICE COCKBURN :—What application do you speak of ?

A. If there is a copy of my letter I should be very glad ; I sent in a statement.

Q. You sent it, where ?

A. To the Home Office.

Q. You sent in an application for the appointment ?

A. No doubt, my lord.

Mr. SERJEANT SHEE :—Did you do so ?

A. I have already replied to that ; if you refer to that as an application, I did so.

LORD CHIEF JUSTICE COCKBURN :—It is one thing to send in a statement of qualification, and so on, and another to make an application for the office.

A. No doubt I was a candidate for the office.

Mr. SERJEANT SHEE :—We will go by steps. You did send in a formal application to the Home Secretary to appoint you as Recorder of Newcastle-upon-Tyne ?

A. I sent in a statement stating what my standing at the Bar was, and asking to have my name put down with other members of the Bar as a candidate.

Q. When did you do that ?

A. I cannot answer that question ; it was between the first debate and the second.

Q. Who told you that it was necessary to send in that statement ?

A. I should not like at this moment to say ; I cannot at this moment tell ; I recollect speaking to some of my friends at the Bar.

Q. Did you apply to nobody else ? Did you speak to nobody else upon the subject, but friends at the Bar ?

A. Not that I am aware of ; I recollect no one ; I was told by no political person.

Q. Were you told by no one in the House of Commons ?

A. Not that I recollect.

Q. Will you swear that you were not ?

A. I recollect having a conversation with Mr. Atherton on the subject.

Q. Was Mr. Atherton in any way connected with the Government at that time? Had you no conversation with anybody else?

A. Your question was, Was I told by any person?

Q. In the House of Commons?

A. To make the application?

Q. Yes?

A. I was not told by any political person in the House of Commons.

Q. Will you say that you did not apply to any person connected with the Government for it personally?

A. I no doubt had conversations at that time after Mr. Atherton had had it offered to him.

Q. With whom?

A. At least, I daresay I had.

Q. With whom?

A. I do not at this moment recollect with whom; if you will assist my memory I will give you a frank answer.

Q. I want to know from you; I was not present.

A. I have no doubt that I spoke to members of the House of Commons, for it was very well known at that time.

Q. Did you not apply to persons connected with the Government to give you the Recordership of Newcastle-upon-Tyne? Will you say that you did not?

A. I applied through the Home Office, sending in my application.

Q. That we know.

A. And I have no doubt that the matter was spoken of to me, and may have been mentioned to me by persons connected with the Government; and I may have stated my standing; but I declare most solemnly, if you ask me whether I was spoken to about it, I have no doubt I was.

Q. Did they apply to you about it, or you to them?

A. My recollection is that I sent in my qualifications and claims to the Home Office; I had heard that the appointment had been offered first to Mr. Ingham, I think, and then to Mr. Atherton.

Q. That does not answer my question.

A. I recollect inquiring whether Mr. Atherton was likely to have it, and speaking about it both to him and other friends.

Q. You recollect inquiring whether Mr. Atherton was likely to have it; of whom did you inquire?

A. I think I asked himself.

Q. Nobody else?

A. I dare say I did, but I do not recollect any other person.

Q. Did you not inquire of some person connected with the Government, whether Mr. Atherton was likely to have it?

A. If you will mention any person's name I will give you an honest answer, but you ask me so very generally.

Q. I do not think it is "general." It is not a crime I am asking you about, I ask it for the purpose of the issue which you have raised here.

A. But it would be a crime if I mentioned a name which I cannot recollect, and I say, on my oath, that I do not recollect any individual person connected with the Government to whom I spoke about it, though I have very little doubt that I may have spoken to more than one.

Q. I do not want to speak about your oath unnecessarily, but could you, upon your oath, say that you had not applied personally to any member of the Government for that office before you got it.

A. I am sure I could. I could, and I can, except that application.

Q. Do you?

A. I do; I say so.

LORD CHIEF JUSTICE COCKBURN:—I will take the answer, that you did not, except by written application to the Home Office.

A. Apply to any one about it.

Mr. SERJEANT SHEE:—Or spoke to them about it?

A. At my instance I did not.

Q. Did you speak to them at all?

A. That I cannot say; I cannot speak so positively to that.

Q. Then you will not undertake to say that before you got the appointment of Recorder of Newcastle-upon-Tyne you did not speak to any members of the Government or to persons connected with the Government, in order to get it?

A. I say not.

Q. You say you will not undertake to say that?

A. You say, did I speak in order to get it? I say in the sense of applying for it, or speaking in order to get it, that I did not.

Q. Did you speak about its being vacant?

A. No; I have already said that I may have asked whether Mr. Atherton was likely to take it, in the course of conversation in the House. I remember speaking to him, and I may probably have spoken to others in the House; but I distinctly say that I did not apply except that I sent that application in; I should be glad if it were produced.

Q. Will you undertake to say that, before you got it, you did not speak to either of the Secretaries of the Treasury about it?

A. I will not undertake to say that after I sent in that notice, and after Mr. Atherton had spoken to me upon the question of his return for Durham, one of the Secretaries of the Treasury may not have spoken to me.

Q. Can you not say that he did?

A. I cannot say that he did; I think it is a state of things that is very likely.

Q. Which of the Secretaries?

A. I had made the application to the Home Office; Mr. Atherton had been offered the appointment, and pending the question whether he would receive it or not, I have an impression on my mind that I endeavoured to ascertain whether he was likely to accept it.

Q. Which of the Secretaries of the Treasury do you think you spoke to about it, or perhaps it would be better to say, which of the whippers-in? I will give you their names; Sir William Hayter, Lord Mulgrave, and Mr. Berkeley.

A. I think it was Mr. Berkeley; I think I spoke to Mr. Berkeley.

Q. Did you tell him you should like to have it?

A. I do not recollect; I think I spoke to him upon the subject. I did not apply to him for it, but I do remember one evening in the House of Commons, when a question arose whether Mr. Atherton was likely to be returned again for Durham, some conversation taking place with me with reference to it.

Q. Did you tell him that you would like to have it?

A. I do not recollect saying so.

Q. Will you say that you did not?

A. I will not.

Q. He was not connected with the Home Office or the Secretaries of State?

A. I had no conversation with him with a view to induce him to exert himself to get it for me, nor did I ask him directly or indirectly to do so.

Q. Or intimate that you would like to have it?

A. That is another thing; the very fact that I asked the question about Mr. Atherton would intimate that I wished to have it.

Q. Did you intimate to him that you wished to have it?

A. Except conversation be an intimation, I did not.

Q. It is a plain question.



A. I had made an application to the Home Office.

Q. Did you intimate to Mr. Berkeley, to whom you say you spoke about it, that you wished to have it?

A. I have no doubt he might gather that from the very fact of our speaking about it.

LORD CHIEF JUSTICE COCKBURN :—As I understand it, he came to you ; I only want to see that I have not got my note wrong.

A. I have no recollection whatever of making any application to any person in the Government, or connected with the Government, for the office ; I do recollect a conversation taking place.

LORD CHIEF JUSTICE COCKBURN :—You (Mr. Serjeant Shee) seem to assume that he said he had first spoken to Mr. Berkeley ; whereas I understood him to say, and have so taken it down, that Mr. Berkeley came to ask him about it.

Mr. SERJEANT SHEE :—Did he ask you if you would like to have it?

A. No, he did not.

Q. Or words to that effect?

A. No.

Q. What did he say?

A. I do recollect a conversation, but the conversation was principally with reference to the chances of Mr. Atherton's return for Durham, who I believed was likely to accept it at the time. At the time I had the conversation with him my impression was that it would be accepted by Mr. Atherton, as far as I can recollect now.

Q. Did you speak to Sir William Hayter about it?

A. Not that I recollect.

Q. Will you pledge yourself that you did not?

A. I will pledge myself that I do not remember it ; he distinctly says that I did not.

Q. He does not quite say that.

A. I will be cautious ; so far as I can recall my recollection I do not remember speaking to him about it.

Q. Will you undertake to say that you did not?

A. I will undertake to say, with the qualification I have already given, that I did not. I never applied to Sir William Hayter to exert himself to get it for me, nor do I recollect his speaking to me about it.

Q. Did you tell him that you would like to have it?

A. No.

Q. Did you tell him what your position on the Circuit was?

A. Sir William Hayter, or any person in the House or out of it, would know that I would like to have it.

Q. Did you tell him so?

A. No; I did not tell him so.

Q. Did you converse with him about it?

A. I have no recollection of it.

Q. You made a speech on the Foreign Enlistment Bill, did you not, on the 13th of December?

A. I cannot recal the date; I did speak about it.

Q. I beg your pardon, I think it was on the 22nd of December?

A. You seem to be looking at a record there, and I do not dispute its correctness; you will believe me when I say that I did not anticipate this, you did not give me notice to prepare to answer as to these dates or to be questioned upon these matters.

Q. It is not usual to give notice, but I will give you all the assistance I can as to dates, I assure you.

Mr. LUSH:—It is usual to justify.

LORD CHIEF JUSTICE COCKBURN:—Mr. Lush, that is very irregular; you will have plenty of opportunity of commenting upon that.

Mr. SERJEANT SHEE (To the witness):—I believe you spoke twice, and I think you spoke first about the 13th of December, and next about the 22nd; I will not take advantage of you.

A. I do not suppose you will, Serjeant Shee.

LORD CHIEF JUSTICE COCKBURN:—What have you (Mr. Serjeant Shee), got before you?

Mr. SERJEANT SHEE:—Hansard.

LORD CHIEF JUSTICE COCKBURN:—There is no objection to referring to it so far as dates are concerned. If you have anything authentic with reference to dates they may be taken, I suppose.

Mr. SERJEANT SHEE:—I have no objection to state that I have myself seen in this publication (Hansard) a speech of Mr. Seymour's, on the 13th of December, in support of the Bill, and that he spoke again on the 22nd.

A. I thank you very much; that is exactly what I say. I say that when I first spoke and pledged myself in favour of the Bill I was not aware that the Recordship was vacant.

Q. It was because you were under that impression that I gave you the accurate date. Now, on the 22nd of December, did you not say in the House that you "were not swayed by any consideration of an apprehension that the Ministers would resign; but, on the contrary, that you felt as an independent member, that when you

had the assurance of the Minister that every exertion had been made to carry on the war with vigour, that he had refused no assistance, come from what quarter it might, and that now he appealed to Parliament to give him another weapon for bringing the war to a speedy and successful termination, you had no alternative but to support the measure."

A. Yes.

Q. Was not the writ for the Borough of Sunderland moved for the next day?

A. It was; but I never understood it was a retainer for my political adherence.

Q. Did you know when you made that speech that the new writ would be moved for the next day?

A. Will you tell me the day on which the writ was moved for?

Q. It was moved, I believe, on the 23rd. Did you know on the 22nd that the new writ for the election of a member for the Borough of Sunderland was to be moved for the next day?

A. I cannot recollect now: I have no doubt I must. You say the writ was moved for on the 23rd, and, therefore, I must have known of it.

Q. Do you not recollect that you did?

A. Except from connecting those facts together; I have no doubt I did.

Q. How long had you known it then?

A. I think it was very generally known in the House; it was in the papers.

Q. Had you known it before you went down to Sunderland, or shortly before you made this speech on the 22nd of December?

A. No, I did not; I pledge my word to it—you have already made a comment on my using the word "oath."

Q. No; I have not complained of it, Sir; I have rather excused myself for using the word than complained of your using it.

A. I went to Sunderland in December to receive a deputation from Hull who wished to present me with a piece of plate.

Q. It was on the Wednesday, I find, before that you made this speech; did you not know then that you were to be Recorder of Newcastle?

A. You mean when I spoke at Sunderland?

Q. Yes.

A. When I spoke at Sunderland I did not know it.

Q. Had you made your application before you spoke at Sunderland?

A. To the best of my belief I had not ; I think I had not ; it is a written document, and it is a long time ago, but to the best of my belief I had not. No, I had not, to the best of my recollection. As you have been so frank in regard to one date, perhaps you will assist me with the other.

Q. I merely wish to be fair, sir.

A. I know I was asked at that meeting if I would support the Foreign Enlistment Bill, and I have a distinct recollection now, my memory being called to the subject, that I did not know it then.

Q. It is not usual, is it, for Recorderships to be given to the members of the sessions practising there—not important Recorderships ?

A. My predecessor in office was chosen from the sessions.

Q. Who was he ?

A. Mr. Williamson, a local barrister ; he had no general practice on the Circuit, and only practised at the Newcastle sessions ; he is an example quite contrary to your supposition.

Q. At that time they were not appointed by the Crown, but by the Municipal Corporation ?

A. That may be.

Q. Is it usual that for important Recorderships, such as this, the selections are made from the sessions Bar ?

A. I can give you an instance. The Recordership of Leeds was given, the other day, to a man very much my junior on the Northern Circuit, Mr. Maule. The Recordership of Scarborough was given to Mr. West, who is of considerably less standing than myself.

LORD CHIEF JUSTICE COCKBURN :—Practising at the sessions ?

A. Yes ; Mr. Maule is the best instance I could give, because his Recordership is worth double mine, and he is my junior, and practised at those sessions.

Mr. SERJEANT SHEE :—When was that ?

A. After the death of Mr. Ellis.

Q. Since your appointment ?

A. Yes.

Q. At that time were there not a great many men on your Circuit of much greater standing than you, and in good practice on the Northern Circuit and in London ?

A. Yes ; I answer your question as you put it ; there were many men who were my seniors, and many men who had good practice.

Q. As many as twenty or thirty on the Circuit, were there not ?

A. Who did civil practice.

Q. Good practice ?

A. Civil practice, not criminal ; no one had better criminal practice on the Northern Circuit, or so good as I had.

Q. Men who were better placed on the Circuit altogether than you ?

A. There were members of the Circuit who were older, and who had larger civil business, and I daresay that in that respect they were better placed.

Q. There were some then on the Circuit who were in good business, and who were there when you were born ?

A. Yes ; and for all I know they may remain on the Circuit now.

Q. And there were many who have since risen to distinction at the Bar, and some who have been raised to the Bench ?

A. Yes ; I daresay.

Q. Is it not so ?

A. In civil practice ; I believe it is usual (at least my experience has certainly been that) for Recordships to be given to members of the Bar who have had criminal business.

Q. Important Recordships ?

A. Yes ; Mr. Blanchard, of the Doncaster sessions, got Doncaster ; Mr. Maule, of the Leeds sessions, got Leeds ; Mr. West, of the East Riding sessions, got Scarborough ; and I could give you several other instances. I think the Recorder of Liverpool, who was appointed the other day, practised at the sessions — Mr. Aspinall.

Q. But he had been Deputy-Recorder for some time, you know. At the time you got your appointment as Recorder of Newcastle-upon-Tyne had you been engaged in any important cases at Westminster, or on the Circuit, other than criminal ?

A. Yes ; I got very early into practice. You are aware of the meaning of the leader of the Bar giving a red bag : it means that his briefs are such as require him to bring a bag into court ; and I got my red bag at the close of my first Circuit.

Q. Had you availed yourself of any opportunity you had of distinguishing yourself in any great case, either at Westminster or on your Circuit ?

A. If I had my fee book I could answer you : I had been in several cases of importance.

Q. At that time ?

A. Certainly at that time.

Q. As leader, or as junior ?

A. Both ; I had been employed before Committees of the House

of Commons in important cases, and had conducted heavy criminal cases on the Circuit as leader—in the town of Newcastle especially.

Q. Criminal cases ?

A. Criminal cases.

Q. In the words of the libel, had you, during the two years that you were in Parliament, secured the passing of any measure by your exertions ?

A. Yes ; I had taken a sufficiently active and prominent part in connexion with the Merchant Shipping Bill of 1852, to receive the written thanks of Mr. Cardwell for the aid I gave. Serjeant Shee was in the House at that time, and knows that I took an active part in that Bill in the Commons.

Q. I decline to say that. I either know it or do not know it ?

A. I have a particular reason to remember it.

Q. That is one measure that you refer to ?

A. Yes. The Bills of Exchange and Promissory Notes Bill was passed through the Commons by me ; it was afterwards amalgamated with a more general measure in the House of Lords ; but the Bill was drawn by me, was brought in by me, and was passed by me.

Q. Do you mean the Bill that was brought in by Sir Henry Keating ?

A. No ; it was brought in by me ; I myself brought it in ; it was the Promissory Notes and Bills of Exchange Bill.

Q. Is that a Bill other than the one that Sir Henry Keating brought in ?

A. There were three Bills. I brought in one, and they were all put into a general measure afterwards ; but I recollect there was a good deal said about it in the press at the time, and I think the LAW MAGAZINE had an article about it, and paid me a compliment.

Q. Do you undertake to say that you believe you got that Recorder-ship on account of your professional eminence or position ?

A. I will undertake to say that I believe I was entitled to it from my professional position. What motives were operating I cannot say.

Q. Do you undertake to say you believe that you would have got that appointment if you had not been in Parliament ?

A. I have no hesitation in saying that the fact of my being in Parliament, *cæteris paribus*, may have been considered a matter in my favour, but, at the same time, that is only speculating.

Q. Do you not know that you got it because you were in Parliament and because you supported the Government on the Foreign Enlistment Bill ?

A. No ; I am confident I did not, because I spoke in favour of the Foreign Enlistment Bill, and the Government knew my intentions, before the Recordship was vacant. If you ask me as to any individual pledge, I am distinct and positive that there was none ; but if you ask me generally whether, *cæteris paribus*, my being in Parliament and a supporter of the Government would give me a preference, I do not dispute it ; and I think it ought, if you like.

Q. And you think it did ?

A. Very probably.

Q. Then it was hardly a subject to crow about over the members of the Northern Circuit ?

A. Perhaps you will read the passage.

Q. You say : "Step by step I vanquished one difficulty and another, and won by degrees the honours which I have received and the dignities which I hold. I obtained a lead at my sessions ; I obtained the best Recordship but one on the Northern Circuit."

A. Yes ; and I say that no Government in modern times could in the face of public opinion have given that Recordship to me if I was not qualified for it. A murmur has never been uttered against the appointment, but, on the contrary, every opportunity has been taken in Newcastle to express confidence as to the mode in which I have discharged my duties.

LORD CHIEF JUSTICE COCKBURN : We really cannot go into that. What has been stated at Newcastle is not evidence.

A. Perhaps I have forgotten myself a little bit.

MR. SERJEANT SHEE : I do not doubt your ability ; I am cross-examining you as to a passage in your speech at Southampton, in which, after attacking the members of the Northern Circuit, you boast that you obtained the best recordship but one on the Northern Circuit. Do you really think that that was a subject for boasting ?

A. If you ask me whether I would deliver a speech like that calmly and after consideration, I should say I would not ; but I think some little allowance should be made for a speech delivered under feelings of intense irritation.

Q. Do I understand you now to admit that you did not receive this recordship solely for professional distinction, but mainly and principally because you were in Parliament ?

A. Certainly I will not admit that I received it mainly because I was in Parliament. I say that from my position upon the Circuit I deserved it.

Q. And got it because you were in Parliament ? Is that what you mean ?

A. No ; I do not mean that ; I mean that my being in Parliament was no disqualification to my getting it.

Q. Do you not believe that your being in Parliament helped you very much ?

A. Very possibly.

Q. Do you not know it ?

A. My being in Parliament showed that a very large constituency had confidence in me.

Q. So far then as this is a boast that you had obtained success over your competitors on the Circuit, do you regret having uttered it ?

A. If it is open to be construed as a boast ; I really was not in a boasting humour when I uttered it ; I was rather meeting my constituents, and pointing out to them, to whom I was a comparative stranger, facts in my history. It was not intended as a boast at the expense of my Circuit ; it was not uttered in that spirit.

Q. You say that you obtained the Palatine rank ?

A. Yes.

Q. I suppose that is given to any gentleman in practice whose character is not known to be affected by imputations of any sort ?

A. It is given to any gentleman in sufficient practice, and holding such a position on the Circuit as would justify the judge in giving that patronage. The Chancellor of the Duchy of Lancaster gives to the judges the right of nominating. Mr. Baron Martin nominated me, and I am sure that if I had not practised, or if he thought my character did not entitle me to it, he would not have given it to me. He was on my Circuit for many years.

Q. You go on to say, "Notwithstanding all my traducers, ay, and at the very time when detraction was doing its worst, I received the rank of her Majesty's Counsel from the hands of the late Lord Chancellor Campbell." Had you applied for the coif before you applied for the silk gown ?

A. Yes ; to Lord Campbell, and to Sir William Erle, the Chief Justice of the Common Pleas. He referred me to the Lord Chancellor.

Q. Was it refused ?

A. No ; it was postponed.

Q. That is the way they do it.

MR. LUSH : You (Mr. Serjeant Shee) have no right to make that observation.

MR. SERJEANT SHEE : I am not going to leave it there. That is the way they do it.

A. My application for the present was not granted, but it was



well known throughout the profession that the Chancellor had decided on refusing all applications. He refused many besides mine; he gave no ranks.

Q. When did you apply for the coif? Lord Campbell made several serjeants you know.

A. He made no serjeants between the time of my applying and the appointment of Queen's counsel.

Q. Did he not make our brother Bourke, who is an Irishman, a serjeant?

A. Not between the time of my application and the subsequent appointment of Queen's counsel and serjeants.

Q. When did you apply?

A. I cannot fix the date, but I know that as a fact, which is notorious in the profession.

Q. Did you apply in the last three months of the year 1860?

A. Yes; I think it was the latter end of 1860: it was not long before I got my silk gown; it was the same Chancellor to whom I applied in each case, first for my coif, and then for a silk gown.

Q. Were not objections taken to your being made a serjeant?

A. I have heard lately that objections were taken. I am aware of none; I have no information or authority.

Q. Were none communicated to you at the time?

A. The first time I heard of it was very recently; I do not know whether there is an allusion to it in that article.

Q. Have the kindness to attend to my question. Were none communicated to you at the time when your application was postponed as you say?

A. Directly or indirectly, none whatever.

Q. What do you mean by this: "Finally, notwithstanding all my traducers, ay, and at the very time when detraction was doing its worst, I received the rank of her Majesty's Counsel from the hands of the late Lord Chancellor Campbell"? Who was traducing you then? You refer to his giving you rank as if it was an expression of his opinion that any imputations upon you were unfounded?

A. After I got my Palatine precedence I think I heard that there were certain rumours to my prejudice afloat.

Q. What did you mean by "Notwithstanding all my traducers, ay, and at the very time when detraction was doing its worst"?

A. I suppose if ever a man has been the subject of observation, I have been.

Q. What did you mean by it? It must have been something that came to the knowledge of Lord Chancellor Campbell.

A. There were statements in hostile newspapers at Southampton, and suggestions which no doubt may have been animated by political bias.

Q. You could not have meant that by what you say, "Notwithstanding all my traducers, ay, and at the very time when detraction was doing its worst, I received the rank of her Majesty's Counsel from the hands of the late Lord Chancellor Campbell." You must have meant something other than newspaper attacks. Do you not know that exception was taken to your being raised to the dignity of serjeant-at-law, on the ground of doubts as to your conduct and transactions which were afterwards made the subject of inquiry?

A. When I made that speech I had no such knowledge, nor did I speak with reference to it. I have heard since that an *ex parte* statement was sent to the Chancellor with reference to the settlement of Mr. Parker's action. I had no opportunity ever given to me of meeting the statement, and I am only now telling you what I heard mentioned at the bar—that a statement was sent, but of my own knowledge I know nothing; no communication was ever made to me by the Chancellor that any statement had been sent to him, nor was any explanation asked of my conduct.

LORD CHIEF JUSTICE COCKBURN:—It is clear then that this observation about detraction and traducers cannot have applied to that.

A. Clearly; it is much more recently that I have heard of that.

Mr. SERJEANT SHEE:—What did it apply to, then? It could not have applied to newspaper articles. You say, "Notwithstanding all my traducers, ay, and at the very time when detraction was doing its worst"?

A. Well, detraction had been doing its worst in this sense; that serious attempts to prejudice me had been made at Southampton by rumours in a way that I could hardly get hold of, but which were floating about the town, as to my having been connected with certain companies, and matters of that kind, but I had no special subject before my mind at the time.

Q. Then you did not mean by this to say that Lord Campbell had exercised his judgment in any way upon the matters of detraction?

A. Yes, I did, I meant to say this—

Q. Did you?

A. You say "in any way." You put your question (if you will pardon me for saying so) in a way which makes it difficult for me to answer it. You say "in any way." I say I did mean that he had in one way, that is, I thought my being appointed in the first

place to Palatine precedence, and afterwards to a silk gown, was a proof that the Chancellor could have had no facts before him to lead him to doubt the wisdom of that appointment. I was only drawing my inference from it. You can draw another. That was the inference I drew.

Q. You did not mean to refer to that appointment as a certificate of character from Lord Campbell?

A. Certainly I did, and I do; not it alone; I referred to my rank at the Bar, which was given to me by the Lord Chancellor as a proof that he considered my character entitled me to it.

Q. Did you know at the time you made that speech whether the serious charges which were afterwards brought before the Bench of your Inn had come to the knowledge of Lord Campbell?

A. I will answer you thus—All I meant to convey by it was that the fact of my receiving that appointment was a proof that the Lord Chancellor was aware of nothing in my position in the profession to militate against my claim to that rank.

LORD CHIEF JUSTICE COCKBURN:—If you are going now to another head of cross-examination, I think this would be a convenient time to adjourn.

Mr. SERJEANT SHEE:—If your lordship pleases.

#### SECOND DAY.

WILLIAM DIGBY SEYMOUR, Esq., Q.C., M.P., *further cross-examined*  
by Mr. SERJEANT SHEE.

Q. I have only a few more questions to put to you. In your speech you complain that “the inquiry before the Benchers was conducted by men sitting down after dinner, varying in their number and attendance, and sometimes postponing the inquiry upon the most trifling grounds;” did you not in the course of the inquiry expressly waive all objections on that ground?

A. At the ninth meeting, when there were only seven Benchers present, my attention was called to the fact that there were not enough present to create a quorum; and I expressly waived the objection. All the evidence in the case, or substantially all, had then been heard.

LORD CHIEF JUSTICE COCKBURN:—You say there were not enough present to create a quorum. I do not understand that.

A. I believe by the statute, or according to the rules and regulations of the Middle Temple, as it was intimated to me, there were

not enough present to constitute a Court. I think there ought to be nine present.

LORD CHIEF JUSTICE COCKBURN :—I am not aware of it.

Mr. SERJEANT SHEE :—That does not answer my question. My question is, Did you not waive all objection ?

A. On that occasion I did; not previously.

Q. I ask whether your attention was called to the fact that all the members who had attended at one time had not attended all through, and whether you did not waive any objection on that ground ?

A. I thought my answer was specific.

Q. No.

A. My attention at the ninth meeting was called to the fact, and was called to the rule of the Inn, and I waived it.

Q. What rule ?

A. There was a rule read to me, and part of the rule required the same number of Benchers to be present on every occasion, and part was as to the number who ought to be present.

Q. Did you waive it ?

A. I did ; I waived it upon that occasion.

Q. Was there a shorthand-writer present every day ?

A. Yes ; there was a shorthand-writer.

Q. Was the evidence printed from time to time ?

A. It was.

Q. And was it sent to you in print ?

A. It was sent to me in print ; the greater part of it.

Q. From time to time ?

A. Yes ; not the whole of it.

Q. Not the whole of it ?

A. No.

Q. What portion of it was not sent to you ?

A. A portion referring to the examination of a gentleman called as a witness by me.

Q. Part of the proceedings of one day ?

A. Part of the proceedings of one day, and not an unimportant day.

Q. During the course of the inquiry did you request members of the Bench, who had not heard all the evidence, to attend ?

A. I did ; I felt so much that I was likely to be a sufferer by the extraordinary change in the attendance of the Benchers.

LORD CHIEF JUSTICE COCKBURN :—I must interpose ; you are the plaintiff in the cause, and a witness. You must not make a speech.

A. I did not wish to make a speech, my lord ; my answer is, I did.

Mr. SERJEANT SHEE:—How many ?

A. One.

Q. Only one ?

A. Only one.

Q. Will you undertake to say that you only asked one Benchers, who you knew had not been present during the whole of the inquiry, to attend ?

A. Certainly, only one ; if you will remind me of any other I will tell you ; only one.

Q. That is a very distinct answer, sir ; I do not complain of the answer at all. When the sentence was read to you, it was read in private, was it not, in the Parliament Chamber ?

A. Yes.

Q. No members of the Inn except the Benchers themselves being present ?

A. No.

Q. And that was about the 22nd or 23rd of January, as I understand. You have stated that a copy of the judgment was sent to you on the 23rd of January ?

A. It was previous to that ; a copy was sent to me some days after it was read.

Q. Can you give me the date when the sentence was read ?

A. Some days previous to that ; I cannot give the date.

Q. Some days previous to the 23rd of January ?

A. Yes.

Q. Did you not, when it was read to you, say that you were still a young man under forty years of age, and that you would use every exertion, and that it would be your ambition to retrieve your character, and to prove yourself worthy of the consideration shown to you by the Bench ?

A. I said the first, but not the last ; I substantially said the first.

Q. Tell me, if you please, what you did not say of that which I put to you ?

A. I referred to my being a young man under forty years of age ; I said that great injustice had been done to my character and my motives, and it would be my ambition to live until I had vindicated both.

Q. Did you express at the time your thanks to the Benchers for not publishing their sentence ?

A. No.

Q. Did they tell you that they did not intend to screen it ?

A. No, not then ; no, not at any time ; they did not tell me.

Q. Will you undertake to say that you did not express at the time your acknowledgments or thanks to them for not making it public ?

A. Certainly not.

Q. Did you thank them for not having disbarred you ?

A. Certainly not ; I thanked them for having pronounced as they did with regard to the three principal charges ; and I added what I stated yesterday.

Q. Before this article was published, had not the inquiry before the Benchers, and your conduct, been the matter of public discussion in many newspapers ?

A. It had been.

Q. There were several leading articles in several newspapers.

A. There were articles upon the judgment. You use the word "discussion."

Q. Leading articles ?

A. There were leading articles referring to the judgment and referring to my speech.

LORD CHIEF JUSTICE COCKBURN (to Mr. SERJEANT SHEE) :—Do you mean before the publication of this article ?

Mr. SERJEANT SHEE :—Yes, my lord, before the publication of this magazine.

Q. In particular, had not all the documents which are set out in this article as part of the libel appeared in the *Times* newspaper, and had they not been made the subject of leading articles in that newspaper ?

A. I think so.

Q. And that for at least two months before this magazine appeared ?

A. There were three articles in the *Times*, close upon one another, in the month of February.

Q. And this I see is the May number of the magazine, and it may not probably have appeared till June.

A. I sent it to my solicitor on the 2nd of May ; I was told that it was going to contain an article, and I purchased it.

Q. Now I must ask you this question : you refer in your speech to the rumours which were current against you or about you, at the time or before the time when the Benchers commenced their inquiry ; had you not in the year 1858 taken the benefit of the Private Arrangement Act to rid yourself of the claims of your creditors upon you ?

A. Yes.

Q. And had you not been opposed ?

A. Yes, by one creditor.

*Re-examined by Mr. LUSH.*

Q. You say you took the benefit of the Private Arrangement Act in 1858 ; for what debts were those ?

A. They were mainly, except as to a very small balance of them, debts that I had taken upon myself, or the balance of debts in connection with a company of which I was unfortunately the Chairman. I had taken upon myself debts to the amount of nearly £40,000 ; I paid about half of them, and the rest was too much for me. I struggled a long time against them, but I was brought down by them at last.

Q. Was that the Company, your dealings in which formed a subject-matter of inquiry before the Benchers ?

A. It was.

Q. And was that the Company in respect of which it was said that your act would have been one, if done, of "romantic generosity and self-devotion" ?

A. Yes ; I claimed credit for having done the act, and I produced what I thought sufficient evidence to prove that I had done it.

Q. You say that one creditor opposed you ; what was the amount of his claim ?

A. It was a claim of £500.

Q. Was he the only creditor who opposed you ?

A. Yes.

LORD CHIEF JUSTICE COCKBURN :—What was his name ?

A. Parker.

Mr. LUSH :—Was that one of the debts in connexion with that Company or not ?

A. Not in connexion with that Company ; it was a debt arising in connexion with another proposed Company.

Q. Now the rule you have referred to as a rule of the Benchers was read to you, I understand, at the ninth meeting ?

A. It was.

LORD CHIEF JUSTICE COCKBURN :—You were present, Mr. Lush, were you not ?

Mr. LUSH :—No, my lord, I did not attend. It is a rule requiring the same number of gentlemen and the same persons to be present on each occasion.

LORD CHIEF JUSTICE COCKBURN :—I understood Mr. Seymour to say that there was a rule that there must be a certain number of Benchers present to form a quorum.

Mr. LUSH :—No, my lord ; the information is this : nine members

attended at the first meeting, and the rule requires that there shall be the same number all the way through, and there being only seven on this occasion they read the rule, which was not a rule requiring any number as a quorum on any one occasion, but that the same number that begin the inquiry shall go on with it; but I was not present at that time.

Q. You say you had given in your adhesion to the Foreign Enlistment Bill on the motion for the introduction of the Bill into the House?

A. Yes.

Q. And you had voted for its introduction?

A. Yes.

Q. On what day was that?

A. The 13th of December.

Q. At that time was there any vacancy in the Recordship?

A. Not that I am aware of.

Q. When did you go down to your constituents after that?

A. On the 18th.

Q. Did you address your constituents upon the course you had taken with reference to that Bill?

A. I did.

Q. When you say you had given in your adhesion to the Bill, had you pledged yourself to vote for it?

A. I had voted for it.

Q. You had voted for its introduction?

A. Yes.

Q. But had you done so in such a way as to intimate that you would support this Bill through?

A. Certainly.

Q. When you addressed your constituents had you any knowledge of any vacancy at all?

A. No.

Q. When was the second reading of the Bill in the House of Commons?

A. On the 19th.

LORD CHIEF JUSTICE COCKBURN:—How did that vacancy arise? By death, or promotion, or in what way?

A. It was either death or a serious illness. The news came from Constantinople, I think.

Mr. LUSH:—Who was the gentleman?

A. Mr. Wilkinson. The 19th was the date of the second reading of the Foreign Enlistment Bill.



Mr. SERJEANT SHEE :—That was the motion for the second reading ?

A. The division was taken that night.

Mr. LUSH :—When was the division taken on the second reading ?

A. On the night of the 19th.

Q. Did you vote upon that division ?

A. I did ; I voted with the ayes.

Q. Did you speak upon that motion ?

A. No.

Q. When did you next address the House upon it, or speak upon it ?

A. On the 22nd ; on the motion that the House go into Committee upon the Bill.

Q. When did you first hear of the vacancy in the Recordership ?

A. To the best of my recollection and belief, upon the night of the 19th I came up by the day train to London ; I was late arriving at the station, and I got down to the House in time for the division. It was after that that a circumstance occurred which I now recall to my memory.

Q. Was it before or after the division that you heard of the vacancy ?

A. It was after.

Q. How did you become informed of the vacancy ?

A. I received a message from my father-in-law, asking me to go to his hotel, and I went there at midnight, and was informed by him of the vacancy, and recommended to apply for the Recordership, and I wrote the letter which I sent at his table.

Q. That night ?

A. That night.

Q. You say it had been offered to Mr. now Sir William Atherton ?

A. Yes.

Q. Did he decline it or not ?

A. Yes, he did ; I recollect speaking to him on the subject.

Q. When did you receive the first intimation that it was given, or was about to be given, to you ?

A. Either the morning after, or some time after, though not long after I had spoken upon the committing of the Bill. At the time I spoke in favour of the committing of the Bill, I had received no promise, directly or indirectly, of the Recordership.

Q. Tell me what was said to you, and by whom it was said, on that occasion about your having it ?

A. The first person I recollect speaking to was Mr. Atherton ; he

said he did not think he would take it himself. I recollect referring to the question as to his going down again to his constituents, and he said that under all the circumstances he would not go for the Recordship, and he stated, that if his opinion was asked he would express his opinion in my favour; and Mr. Watson, afterwards Mr. Baron Watson, also.

Q. From whom did you receive any intimation that you had got it, or were about to have it?

A. As I said yesterday, my recollection is, that Mr. Berkley told me that Mr. Atherton had refused it, and that he thought that under the circumstances I should probably get it.

Q. And when was that said to you?

A. It was either on the night after I spoke on the committal of the Bill or the next day—I cannot recall it now, but it was certainly after that speech.

Q. Was there any word or any understanding whatever, at any time, that your vote was to be influenced by the Recordship?

A. Never: there is not a pretence for the suggestion.

Q. And was it influenced by it?

A. No.

Q. Now, with respect to the Circuit: What is the usual course upon the Northern Circuit as to expelling a gentleman or not from the Bar mess—where is it done?

A. Well: you say, “the usual course”—I have known an instance in which a gentleman was expelled, and it was done at Liverpool. That was on account of his non-payment of some fees due to the Circuit.

Q. In your case, where did the committee sit—at York or Liverpool?

A. The committee sat in chambers in London. They did not meet on Circuit, but when I referred to York yesterday, it was with reference to a meeting which took place at York.

Q. You stated that you sent in your resignation?

A. Yes.

Q. Your reasons you gave us yesterday.—What steps were taken by the committee upon that? You sent in your resignation?

A. I sent in my resignation in consequence of the committee insisting on having the report circulated upon the Circuit before I had closed my case. I then resigned, and then the committee stood upon their rights with regard to the report, and one of them moved that my resignation should not be accepted, but that, instead of that, my name should be erased from the mess list.

Q. I do not know whether you told us yesterday the date of the letter which you received from the late Lord Chancellor as to his taking charge of the Admiralty Bill?

A. The 14th of February.

Q. And the date of the letter announcing that you were to be appointed Queen's Counsel?

A. The 19th; perhaps I may be allowed to add this: All I wish to say is, that the Lord Chancellor had before him a substantial ground for supporting my application for silk.

Q. As to the rumours you have referred to as having been circulated in Southampton and elsewhere, were those rumours relating to the charges which were afterwards before the Benchers, or were they different rumours?

A. They were the same.

Q. They were as to the same matters that the Benchers investigated?

A. Yes.

Mr. LUSH:—That, my lord, is the plaintiff's case.

May it please your lordship, gentlemen of the jury; my learned friend, as I had before supposed, has no witnesses whatever to call before you. He does not produce a single witness to attempt to palliate this libel.

LORD CHIEF JUSTICE COCKBURN:—I should not have permitted it. There is no plea of justification.

Mr. LUSH:—No, my lord; but, gentlemen, my friend has called no witnesses for the purpose of explaining upon what ground, if any, the author came to write the venomous article which was read to you yesterday; nor do we know who the individual is who has ventured to put himself forward in this garb, and who shelters himself behind the respectable name of the publisher of this magazine. Talk of garotting, indeed! What offence can be greater than that of an anonymous writer sending into the world venomous shafts like these, against the character of an individual, and keeping himself in the background from first to last, without attempting to prove, when he is challenged to do so, that he had any justification for it; and without stating what his motives, and what his reasons were. Is it not obvious that the writer, whoever he is, is a person who is conscious that his motives would not stand the test of inquiry, and who is sensible that his conduct, in writing this abominable libel, could not admit of the smallest justification or excuse? You do not find the least intimation who the author is, where the information came from, or what was in the mind of the writer when he penned this

libel, which manifests a degree of malignity such as is very seldom to be found in articles of this description. My friend asked Mr. Seymour whether comments had not appeared in the public papers relating to the judgments of the Benchers of the Middle Temple, and he said that comments had appeared; but were they anything of this description? Has my friend shown that any newspaper in England ever ventured to assert one half of that which is charged here? Not one. No doubt it got before the public that inquiries had been going on with reference to the conduct of Mr. Seymour; and no doubt rumours had been in circulation with reference to Mr. Seymour;—that is a misfortune under which Mr. Seymour has laboured for years; misty rumours taking no tangible shape were in circulation against him, and so they were suffered to remain until Mr. Seymour took a step in the profession, which at all events ought to have stopped them; because, if these were charges fit to be brought forward at any time, certainly they were fit to be brought forward at an earlier time when Mr. Seymour was practising at the Bar.

Now what has been the course of cross-examination that has been pursued by my friend? Why, almost from first to last, Mr. Seymour has been cross-examined as to a speech which he made to the electors of Southampton after he had gone through the ordeal of which you have heard; at a time of heat and excitement, when he was goaded on by those abominable placards which were circulated about the town. Almost the whole of my friend's cross-examination of Mr. Seymour, was with a view to ascertain whether everything he had said in the course of that speech was strictly and literally true. Now I will not ask my friend, for I must not be personal, but I would ask any gentleman whoever became a candidate for a seat in Parliament, whether he would like to be put upon his oath as to the literal truth of everything he ever said to electors? Mr. Seymour goes down to Southampton and tells the electors, in substance truly, what has been going on; his language may have been a little exaggerated;—if it was, it was quite natural that it should be so, considering he was speaking under feelings of great excitement and great irritation. He may have said more than could be strictly and literally justifiable, or he may, even, if you please, have highly coloured what he said; and do not forget, gentlemen, that it was Hibernian colouring. It is not fair or just to measure with strict accuracy every word uttered under such circumstances; and yet my friend has been instructed to try the merits of Mr. Seymour's case, and the propriety of the demand which he makes in this action, by the test of whether every word he addressed to the electors at Southampton

on the occasion on which he made the speech to which your attention has been so often called, can be strictly and literally borne out. Could anything be more absurd or unjust? If, instead of a speech addressed by Mr. Seymour to his constituents, it had been an affidavit, you could not have applied it to a stricter test than that to which you have been invited by my friend. That is the only way in which the writer of this article, on being called to account for what he has written, attempts to defend himself. Why does not my friend address himself to the real merits here? What is the good of asking whether it is literally true, that from the earliest time when Mr. Seymour went the Northern Circuit he had been made the mark of a cruel and jealous opposition? Suppose Mr. Seymour did say that which he is reported to have said, it is just one of those flights of language in which a person would be likely to indulge when speaking upon the hustings. What is the use of asking him whether language like this, "I came among the members of the Northern Circuit with that misfortune which my countryman, Grattan, has described; I came with the curse of Swift upon me—I was an Irishman," was strictly and literally true? I say that is all Hibernian language. Mr. Seymour went down to Southampton with feelings of sore irritation, after having gone through the ordeal of an eight months' scrutiny before the Benchers of the Middle Temple, and after having received what he considered a most unjust reproof and censure. On arriving in Southampton he found the whole town placarded with a statement calculated to make people believe that he had been condemned and found guilty of the charges which had been made against him, when, in fact, he had been acquitted of those charges; and then having made a speech there he is now asked whether every word uttered by him in the course of that speech was or was not true. Is not that mere rubbish? What has it to do with the article that my friend is called upon here to defend? What is there in all you have heard to justify the use of language such as that which you heard read yesterday? The writer says:—

"There are two kinds of Irishmen; there is the Irish gentleman, generous, accomplished, and urbane, perhaps the highest type of the genus gentleman to be found in the United Kingdom. There is also the Irish blackguard, swaggering, foul-mouthed, and shameless; the most insolent of upstarts, the most unblushing of swindlers; never destitute of a quarrel, never at a loss for a lie. For as the Irish gentleman is of rare quality, so is the Irish blackguard consummate in his growth. Ireland is always great in extremes, more especially in her psychological productions. She has reared generals who have led their armies to certain victory, and she has reared also the

tribe of cabbage garden heroes. She has adorned our Parliament with splendid orators and consummate statesmen, and has afflicted it also with a breed of bawling demagogues and venal fools. And so it happens, that this green and prolific island, with the singular versatility of her race, has supplied to the bar of England some of its brightest ornaments, and some of its blackest sheep; bestowing on the former a learning and eloquence which Englishmen are proud to admire, and enriching the latter with a power of impudence and a fertility in fraud which defy all description, as (to the uninitiated intellect) they pass all knowledge. Should one of this latter flock find his way to an English Circuit, it could hardly be considered a matter for legitimate surprise if he should become an object of suspicion and dislike, and '*hic niger est*' be the motto coupled with his name."

Has anything been brought out by my friend's cross-examination of Mr. Seymour to justify the writer in using language such as that? What has he attempted to do? The defendant, not having dared to justify what he has said directly, has attempted, indirectly, to show that Mr. Seymour obtained his Recordership at the price of his vote in the House of Commons. That is what my friend has been labouring to prove. Now just see what the fact is. The vote which Mr. Seymour gave, and by which he pledged himself to support the Government with reference to the Bill which was then in Parliament, was given, so far as we know, before any vacancy had occurred; at all events, it was given before it was known to Mr. Seymour that there was any vacancy. On the 13th of December he had pledged himself to support the Government on that Bill. On the 19th the Bill was virtually carried in the House of Commons. Mr. Seymour voted for it, and at the time he so voted he did not know that there was any vacancy in the Recordership. He has sworn that his father-in-law came to London, told him of the vacancy, and got him to apply for it after he had made his speech in favour of the Bill. If he used the influence which the fact of his being in the House of Commons gave him to get what he fairly could, does that entitle the writer of this article to call him a black sheep? Mr. Seymour being in the House of Commons, it is very likely indeed that his position, as member for so large a constituency as that of Southampton, gave him an influence over others. That is a natural and legitimate influence which every man looks to: and I should like to know what member of the House of Commons there is, or ever was, who would not use the legitimate influence his position there gives him to obtain, if he can get it, that which he wants. What, in the world, do people go into Parliament for? Every man, in whatever position of life he may be, will use such proper influence

as his position gives him, to get what he fairly can get. It is human nature; and if that is to make a man a "black sheep," tell me where, in Heaven's name, I shall find a white one? You find that one man succeeds, and another is disappointed; and it often happens that the man who succeeds becomes, on that very account, an object against whom the spite and malice of the man who fails is directed. If my friend could have shown that Mr. Seymour had bartered his vote for the Recordership, (which is what the libel imputes to him, and what my friend tries to insinuate,) and had pledged himself to vote for the Ministry if they would give him that appointment, that, no doubt, would have been an abuse, and a corrupt use, of the influence which his being a member of Parliament gave him. How does the fact stand? The fact manifestly is, (and if it were not so, my friend has Hansard here and has the means of correcting me,) that Mr. Seymour had voted and had pledged himself to the Government to support the Foreign Enlistment Bill before he ever heard of the vacancy in the Recordership, and, for aught we know, before the vacancy had, in fact, occurred. He voted for it before he heard of the vacancy; and sent in his application for the Recordership as any other gentleman might, and as he had a perfect right to do. It is very likely that, on account of his position in the House, he got the appointment when others would not. My friend says, "Is it not very extraordinary that you should have got it, you being a barrister practising at those sessions?" Not at all. Mr. Seymour has instanced other cases of the same kind. Mr. Seymour's predecessor had been appointed from the same sessions. Then my friend says, "Were there not other gentlemen of longer standing and of larger practice than you?" "Yes," says Mr. Seymour, "of longer standing and of larger practice in civil business; but my experience has been that persons who have been in good criminal business have been supposed to be more fit for such an office." Then my friend says, "How did you get your silk gown?" Mr. Seymour says, "I first applied for the coif; it was understood that no more serjeants were to be made, and my application for the coif was postponed. I afterwards applied for a silk gown, and that rank was conferred upon me at the same time that it was given to several other gentlemen." Who among those gentlemen was better entitled to a silk gown than Mr. Seymour? Mr. Seymour says, "My business at that time was equal to that of any of those gentlemen." What is there in Mr. Seymour's appointment from which you can justly infer corruption? Do you infer corruption from the fact that the Lord Chancellor, when he was bestowing the rank of Queen's Counsel on



a number of gentlemen who were applicants for that distinction, gave it also to Mr. Seymour, who was as much entitled to it as any of them by his standing and his practice? What has there been in Mr. Seymour's conduct to palliate in the slightest degree the abominable language in which this writer has thought proper to indulge? Remember, this is not an article written in the heat or excitement of the moment; it is a deliberate composition, published in a magazine addressed to the profession of the law, and intended to be kept as long as law books are preserved; and it will be appealed to and resorted to as a book of reference as long as the book lasts. In that respect it differs from a newspaper or any ephemeral publication. It does not profess to be a comment upon the conduct of the Bar generally, or to discuss the propriety of altering the arrangements with reference to the admission of persons as barristers, or the supervision and control which should be exercised over them, but it is headed on every page, "William Digby Seymour, Esq., Q.C., M.P." What is it but a most gross attack on Mr. Seymour throughout; the general words which you find at the beginning being only intended to pave the way for that which comes afterwards? The attack upon Mr. Seymour is personal and specific. There can be no doubt as to the language that is used. I do not say one word against the Benchers of the Middle Temple; I do not complain of them for having instituted the inquiry, nor do I complain of the manner in which that inquiry was conducted; but I say that those gentlemen having investigated the charges which were brought against Mr. Seymour, and Mr. Seymour having been called on to account for his conduct years before, when he had been connected with a company with which he had, at the time of the investigation, long ceased to be connected, and the charges having been declared not proved, the animus of the writer of this article is apparent, when he comes forward, and not only reiterates the charges before made, but does so with a sharper and more envenomed sting; and follows that up by another publication in the month of August, after the action has been brought, in which he says, in effect, "Though the Benchers have acquitted you, I do not; I have read your own evidence and your own statement, and, in my judgment, that evidence and that statement do not amount to a defence of the allegations." These charges, therefore, are repeated after they have been investigated by the proper tribunal; they are persevered in up to the time when the action is brought, and they are persevered in afterwards in a second publication; nay, they are persevered in now indirectly, and so far as they can be, in this court. I ask you, then, what damages



you will give to Mr. Seymour ; because this action is virtually undefended ? Just consider what the effect of your verdict will be. Here is an indictment, or that which is equivalent to an indictment, against Mr. Seymour, which will stand as long as this book lasts. Mr. Seymour has brought an action against the publisher, who has not dared to plead that any one statement in it is true. The very first time that Mr. Seymour has an opportunity of bringing his case before a jury, the defendant does not dare justify what is here said, and so, in effect, withdraws the question from the jury. The amount of compensation that you give in this case will be for ever deemed to be a test of your appreciation of the character and conduct of Mr. Seymour, attacked and persecuted as he has been. I present him to you confidently as a persecuted man. He happened to become involved, years ago, in transactions, in which, I agree, no man ought to involve himself, much less a barrister ; he afterwards honourably paid £20,000 of his debts, but was not able to pay the rest ; and then having withdrawn from those speculations in which he had formerly been engaged, and having devoted himself to his profession, in which he reasonably hoped to have a prosperous career, these charges are all kept in the background, until he has obtained in the proper and regular course that rank at the bar which every man hopes to attain sooner or later ; then, and not till then, are these abominable charges brought against him ; he is subjected to an ordeal to which no man at the bar has ever before been subjected, and acquitted after a long and searching investigation ; and then, after that is all over and done, the writer of this article thinks proper, not only to rake everything up again in this book, but to say in words which cannot be mistaken, that Mr. Seymour is one of the "black sheep" of the law, and that he ought to have been disbarred.

Gentlemen, I ask, What damages will you give to Mr. Seymour ? I present him to you as a persecuted man. He got into Parliament, and by that influence which, I say, he fairly possessed, he obtained his Recordership. He has been in that way successful, and on that very account he has been persecuted. My friend will have an opportunity of addressing you last ; do not let him lead you aside from the real question here. The real question is not whether every statement which Mr. Seymour made to the electors at Southampton was true or not. Let my friend say whether he can explain away the language which is here used. The only contention that my friend can properly make is, that this is no libel at all ; for that is the only issue here. My friend must say that this article is not defama-

tory—he must say that it does not mean Mr. Seymour, or that, if it does, it is only a fair comment on the conduct of a public man. No doubt the public conduct of a public man may fairly be criticised, but the law says you shall not attack the private character of any one. What pretence is there for saying that this is nothing but a fair comment on the conduct of a public man? Is it fair to say of a man, that he is a “black sheep,” “an Irish blackguard,” and that he is “fertile in fraud”? To call that nothing more than fair and legitimate comment, is to ignore altogether the meaning of the English language. Do not let my friend lead you away from the real issue, which is, Is this a libel defamatory of Mr. Seymour? If it be, then there is no justification; and there being no justification, I ask you for such a verdict as will mark your sense of the injury Mr. Seymour has sustained.

Mr. SERJEANT SHEE:—May it please your Lordship, Gentlemen of the jury, you have heard a great deal, in the course of this cause, of the jealousies which are said to exist in our profession, but neither you, I think, nor any of my learned friends by whom the court is crowded, will be inclined to consider me an object of jealousy, or much envy me the task which I am now called upon to go through. It is a task which, if I could have done so with any degree of propriety, I should have been only too glad to have escaped. I declined to accept it, until I had satisfied myself, by a careful perusal of the book which Mr. Seymour has published, and which I had not before seen, that I could not, practising as I do before my lord, and as senior member of the Common Law Bar, refuse my services to Mr. Butterworth. I should not have been justified in declining to do that which every one of my learned friends would have regretted to have been obliged to undertake. Having undertaken it, I have the satisfaction of knowing that I am counsel for an honourable and respectable man, who desires to be defended by none but honourable and respectable means. Whether Mr. Seymour followed the advice which, relying, as he well might, on the professional friendship or acquaintance, the *necessitudo sortis*, which exists amongst us, he four or five years ago asked and obtained of me, I have not, and never have had, the means of knowing; but I must do him the justice to say, my impression at the time was, that he intended to follow it. If he had consulted me before he brought this action, I should have endeavoured to dissuade him from bringing it, and for this reason—it affords him no fair opportunity of clearing his character from the imputations by which it has, unfortunately, become stained, and no

opportunity to Mr. Butterworth, if so disposed, which he is not, of establishing their truth.

Gentlemen, the contents of the libel set out upon this record are such as to give to any person desirous of making a long oration about everything and everybody, abundant opportunity of self-indulgence. The conduct of Mr. Seymour five, seven, ten years ago, as chairman of the Waller Gold Mining Company; the honour and independence of the Bar, and the conduct to Mr. Seymour of an important subdivision of it, the Northern Circuit; the jurisdiction and duties of the Benchers of the Inns of Court, and the manner in which the Benchers of the Middle Temple have administered to Mr. Seymour the half-public half-private justice which they dispense; the motives and the objects with which the minor patronage of the law is bestowed by the Home Secretary, and the higher patronage and honours of the law by the Lord Chancellor; the representation of the people in the House of Commons by gentlemen of the long robe; the character and respectability of Parliament itself, are topics, none of which, with a little skilful handling, could be deemed irrelevant to the questions, extended by a long, loose, unpointed declaration, and left wide by the plea upon this record.

I cannot undertake to steer absolutely clear of any of these topics, but I undertake to keep steadily in view, throughout the whole of the observations which it will be my duty to address to you, what I have ever considered to be a golden rule for the guidance of an advocate for the defendant in a case of libel not justified upon the record:—vindicate your own client if you can, on grounds known to the law, and to the just and right feelings of honourable and sensible men, but do not unnecessarily attack the plaintiff. Mr. Seymour, gentlemen, may rest assured that no shaft shall be hurled by me against him, which he, by bringing this action, has not forced Mr. Butterworth to take up, and hand to me for his defence.

Before I proceed to address myself to the substance of the article which is complained of by my learned friend, and to his observations upon it, allow me for a moment to call your attention to the position and character of the defendant, the plaintiff, and the other persons who are mentioned in the record. The defendant, to begin with, is one of a firm of law-publishers, as eminent as any in the city of London; he is a gentleman of high character and respectability, a man of property, perfectly responsible, and perfectly competent to meet any claim which may be made upon him. I do not understand what my learned friend means by saying that we have erred in not proclaiming who the individual is who wrote this article. Do we

ever hear any such proclamation made in cases of libel? Hardly ever! It is enough that the man who stands before the jury to answer for what he has done—the thing done and complained of not being the writing of the article, but the printing and publishing of it—enough for every purpose of justice and of fairness between man and man, that he should be a responsible person in a position to meet any damages which a jury may think right to give; and there is no man in this metropolis, as Mr. Seymour well knew when he brought this action, better able to bear the brunt of it, than the gentleman who is the defendant upon this record.

Gentlemen, the Inns of Court, as you may probably know, are voluntary societies, wholly independent of the Crown and the Government of the country, which possess the privilege of conferring on young men, who have been for a certain number of years (I think it is now three) regular frequenters in term-time of their public hall, who have attended a certain number of lectures or submitted to an examination as to their professional attainments, the right of practising as barristers. The governing body of these societies are called Benchers; they are always men of considerable standing at the bar, and almost always of the rank of Queen's Counsel. The discipline maintained and enforced by them is of the gentlest, the most considerate, the most indulgent character. Knowing, as they well do, that the people of this country of every grade look to our profession as the means of raising their children; whatever their original condition, to social honour and distinction, and count, with patriotic and truly popular pride, in the House of Lords, the coronets which were won by the light of the midnight oil in the study of the noblest of all human sciences—the jurisprudence of a free people; the Benchers of the four Inns of Court admit to their societies the sons of gentlemen of the highest rank, of dignified and hard-working clergymen, of eminent solicitors, of prosperous merchants, of respectable farmers, shopkeepers, and even mechanics, on the easiest possible terms, and on a footing of perfect equality. When once they become members of these societies, nothing is required of them but that they shall conduct themselves as gentlemen—as gentlemen in the best sense of that word—that is, as men of honour and integrity. If they fail in that important particular, they are liable to have their conduct inquired into, and to be privately or publicly reprimanded; they are liable also, subject to an appeal against a reprimand, or against the heavier sentence, to be deprived of the degree which the society has conferred. And it is quite right they should be so liable. According to the usages of this country, matters of the deepest moment, affecting

the honour of families, interests the dearest that can be conceived, are by the subjects of the Queen, of every class, entrusted, with entire confidence, to the members of the Bar, in full reliance upon the certificate of character conferred upon them, with the degree of barrister, by the Inns of Court. It is supposed by the people of this country, and truly supposed,—believed, and believed with good grounds for the belief,—that the body of the Bar, from whom the judges of the land are selected, are free from all suspicion upon their honour, and that it can only be in an exceptional case, in one instance out of many hundreds, that a barrister can be reasonably suspected of having failed in that common and ordinary duty which is expected of the members of every respectable society—that is, that he should behave like a man of honour and a gentleman. The case of Mr. Seymour has created an impression, that the jurisdiction exercised by the Benchers of the Inns of Court in cases such as those relating to Mr. Seymour's conduct, ought to be entrusted to a committee or council of all the Inns of Court, so that the Benchers of no one Inn should be subject to the responsibility of too great severity, or, what is almost as bad, too great lenity in dealing with charges so serious. Whether that would be, as many think, an improvement, we are not here to inquire. Hitherto, the jurisdiction exercised by the Benchers of the Inns of Court over the members of their societies, has given entire satisfaction to the vast majority of the profession, for this reason; it has been generous, tolerant, and just, administered on all occasions with an earnest desire to take a liberal view of anything that may have been done amiss, and to save the character and the means of livelihood of those whose conduct has become the subject of inquiry.

The plaintiff, Mr. Seymour, appears to have been born in an honourable and respectable station. He has had the great advantage which I remember to have been described by Mr. Burke, of having never seen anything mean, low, or unworthy during his infancy and childhood. He is the son of a respectable clergyman of the Irish Established Church—one of a body of whom I may be permitted to observe—knowing them well—that a higher class of gentlemen does not exist in the United Kingdom. He received the best possible education at Trinity College, Dublin; and he came to England with every recommendation in his favour. At the age of about twenty-one he became a member of the Society of the Middle Temple;—and here I may say that during the long time that I have been at the bar, I have never known a single instance of a complaint of injustice or of hardship on the part of the Benchers of

that Inn to any member of the profession. He became a member of that society—submitted himself to its rules and to the jurisdiction of its governing body. In due time he was called to the bar, and joined, at the age of twenty-four, the Northern Circuit. He appears to have been admitted to the Bar Mess of that Circuit without the smallest objection being made to him. There could be none. No young man of his age—just admitted to the bar—finds the least difficulty in joining the Bar Mess of any Circuit. We admit such men as a matter of course. If a man has been many years buffeting about in other pursuits, it becomes necessary that we should know something about him; but a young man—twenty-four years of age—just called to the bar, joins the Northern, or the Home, or the Western, or any other Circuit Mess on a mere introduction, and is received in the friendliest possible way.

When I come to notice the details of the article complained of, you will be enabled to judge what the difference is between the reception of a Scotchman, an Irishman, and an Englishman. Mr. Seymour became a member of the Northern Circuit—a Circuit which has always numbered among its members a large portion of the most honourable, the most learned, the most eloquent, and in all respects the most distinguished members of our profession. At that time at the head of the Northern Circuit were gentlemen whose names it is enough to mention to satisfy you that he could not have joined a society in which he had a greater reason to expect justice. I will mention first a learned friend of mine, not now present, who, though he has not been raised to the Bench, might have been raised to it at any time during the last fifteen years with the assent and approval of the whole body of the profession—my learned friend, Mr. Knowles—a man as incapable of doing an injustice, or of acting unkindly, as any person in the world. Mr. Knowles, the late Mr. Matthew Talbot Baines, Sir David Dundas, and Mr. (now Baron) Martin, were the leaders of that Circuit, and the leaders of a Circuit, to a great extent, give a tone to the Circuit. Mr. Seymour had the advantage of joining the Northern Circuit when those gentlemen were the leaders of it. He went the Durham Sessions, and did his best, as all young men do, to get on; and he appears to have succeeded to some considerable extent at those sessions. In the year 1852 he was returned to Parliament, at the comparatively early age—for a barrister—of thirty, as one of the representatives for the borough of Sunderland. When he got into Parliament he took the liberal side in politics, and generally voted with the party which was in power,—the

liberal party. In 1852-3, soon after he had become a Member of Parliament, he seems, unfortunately, to have connected himself with stock-jobbing transactions. He became associated, as chairman, with a body of swindlers calling themselves the directors of the Waller Gold Mining Company. This appears by his evidence to-day, and by the letters which are set out as part of this libel, and he takes credit to himself for having, as chairman of that company, suddenly ascertained that his co-directors were a set of swindlers, and for having undertaken all their liabilities to an amount, as he says, of £40,000,—£20,000 of which he has paid. He became also, unfortunately, connected with a printing scheme, which is mentioned in the article complained of; and in his protest published by him in the *Times* newspaper to the Benchers of the Middle Temple, dated the 3rd of February. It appears from that protest that he had been charged by a Mr. Barker, a respectable solicitor, with having misappropriated a sum of £500 which had been handed to him for a particular purpose; and it is plain—whatever attention he may have paid to his profession and to the modest emoluments which he obtained at the Durham and Northumberland Sessions—that from the date at which he became a Member of Parliament until the end of the year 1854, when he was made Recorder of Newcastle, his time was not employed as the time of the honourable men who were members of his Circuit and members of the Bar generally was employed, but in an endeavour to get rapidly rich by stock-jobbing transactions, and that just at the time when he was thus mixed up with those who deserved no better name than that of swindlers; in the month of December, 1854, in the eighth year of his standing at the bar, he was appointed Recorder of Newcastle-upon-Tyne—one of the largest of our commercial towns—in which the jurisdiction of the Recorder, both criminal and civil, is very extensive. On his appointment to that office he lost his seat, and he remained out of Parliament until the year 1859, during which time all his affairs became the subject of that description of inquiry which takes place when a man becomes a bankrupt. He took the benefit of the Private Arrangement Act, which, before gentlemen not traders could be bankrupts, used to be called the “Gentleman’s Act.” In the course of his endeavour to obtain the benefit of that Act, he was opposed by the solicitor whom I have mentioned; and it appears from the papers now before you, and which he himself brings before you—that he was opposed on the ground that he had obtained from him the sum of £500 fraudulently, and refused to return it. That was his position. It appears from



his speech at Southampton that this was perfectly well known—generally known to the members of his profession. It was known also, you may depend upon it, in commercial circles in the city; notwithstanding, which—to the astonishment of every one—on the 22nd of February, 1861, he was gazetted as Queen's Counsel, in company with some ten or twelve gentlemen upon whose honour and character there never had been a stain, who were beloved and respected by every member of the profession, and almost every one of whom might have been appointed to the judicial bench without a murmur on the part of any one who was left behind.

Gentlemen, my learned friend, Mr. Lush, complains that the charges which were ultimately brought before the Benchers of the Middle Temple against Mr. Seymour, had not been brought forward at an earlier period. I agree with my learned friend that the honour and character of the junior members of the Bar is a matter of the highest concern. It is of the last importance that every member of the Bar should be a man of honour and integrity; but it is not so mischievous that a junior member of the Bar, without position or professional rank, should be detected in conduct unworthy of a gentleman and a man of honour, as it would be in the case of one of the judges of the land, or in the case of a gentleman who has been appointed one of Her Majesty's Counsel, with a right, not a strict but a conventional right, and one which without good cause is never disputed, to become a Benchers of his Inn. For three years, from the time when Mr. Seymour took the benefit of the Gentleman's Act, until the time when Lord Chancellor Campbell thought right to make him a Queen's Counsel, rumours most injurious to his honour and character had been current in the profession. My learned friend says, "Why were these charges not brought forward before?" Nothing, with certainty, was known about them until Mr. Seymour took the benefit of the Gentleman's Act; but when he did take the benefit of the Gentleman's Act then it became known, not with perfect accuracy, but with a tolerable degree of precision, what the nature of the charges against him was. His rank as Queen's Counsel gave him a position on his Circuit, and a position here in London, and a position in his Inn, which no man ought to hold whose character is not free from suspicion; and accordingly the Benchers of his Inn, having been informed of circumstances which threw a grave shade upon the antecedents of Mr. Seymour, thought it necessary to call him before them to explain those circumstances. Mr. Seymour submitted himself to that



inquiry ; and the result of that inquiry, after about fifteen meetings, was the judgment which you have heard read, and which I will presently read to you again. The Benchers, having come to the conclusion that the principal charges were not proved, although Mr. Seymour's conduct had been such as to deserve a severe censure, had two courses to pursue ; they might reprimand him in private, or reprimand him in public ; they might, as they did, read the sentence to him in their parliament chamber, none but the Benchers being present, or they might, if they thought proper, screen and make public the judgment at which they had arrived ; they thought proper, in mercy to him, not to screen their judgment. They thought it would be better (it was manifestly better for him) that a general impression should prevail that his conduct had brought upon him their censure, but that it had not been such as to justify his being disbarred ; and that under the influence of the admonition which that censure conveyed, he should have an opportunity of deserving, by conducting himself for the future as an honest and honourable man, the position in the profession which he had well nigh forfeited. On the 23rd of January, the Benchers having a few days before read their sentence to Mr. Seymour, sent him the sentence in writing, accompanied by all the evidence upon which it was founded. When that sentence was read to him he had expressed himself in the terms which you have heard him state ; they were terms intimating no dissatisfaction with the conduct of the Benchers towards him. It had, in fact, not been severe ; and he had from the 23rd of January until the 3rd of February to consider what he would do under the circumstances in which he was placed. No one can doubt that to a sensitive and honourable mind such a censure must have been a cause of very great unhappiness ; he could not but feel that men, who could have no possible motive for doing him an injustice, had taken, if their sentence expressed their real opinions, a course in respect of him much more lenient than they could possibly justify ; he was aware that whatever little irregularity had taken place in the course of the inquiry, no substantial irregularity had been committed, because the evidence which was taken every day that Mr. Seymour attended before the Benchers was communicated to him in print, as well as to all the Benchers of the Society ; and he cannot have supposed, and he did not, in fact, suppose, that any member of that Inn would have taken part in the judgment which was pronounced upon him without having fully informed himself of all the evidence which had been produced against him, and of the evidence which had been adduced in his favour. He had from

the 23rd of January till the 3rd of February to consider what he should do. Mr. Seymour tells us that he was advised not to appeal to the Judges. Whoever gave him that advice, gave him, in my opinion, very bad advice. I am not aware that the Judges, who are, *ex officio*, Visitors of the Inns of Court, would have refused to entertain his appeal ; if they did refuse we shall know it before this cause is over.

LORD CHIEF JUSTICE COCKBURN :—There is no ground at present for saying that the Judges refused to entertain an appeal.

Mr. SERJEANT SHEE :—None, my lord. And I say, gentlemen, that if they did refuse to entertain it, I am quite certain it will be known before this cause is over. Mr. Seymour states that he was advised that he could not appeal. I think that no single member of the Bar should have undertaken to give that advice. What ! That a censure dishonouring to a member of the Bar, a Queen's Counsel, and a Judge of the land, should be passed by the Benchers of an Inn of Court, and that he should have no appeal against it to the Visitors of the Society ! that it should be screened in the Society's hall so as to give it (for that is the inevitable result) a certainty of publicity in the public papers, and that the member of the Inn so disgraced, it may be ruined, should have no opportunity of redress ! I believe it to be wholly impossible. I do not know who gave Mr. Seymour that advice, but he was a bold man who did it ; and I believe that any one of my friends who hear me now would have told Mr. Seymour, if he had thought it right to consult him, "Do not lose a moment, write to the Lord Chief Justice of the Court of Queen's Bench, the highest in rank and in authority of Her Majesty's Judges, and ask him to cause the matter to be investigated." Mr. Seymour did not take that course ; and I grieve now to have to call your attention to the course which he preferred to it. Mr. Seymour's course was one which, when fairly considered, as I have no doubt it will be before this cause comes to an end, leaves him no pretence whatever for bringing this action. He went, on the 4th of February, into the market-place of Southampton ; he had assembled there to hear him the electors and non-electors of the borough ; he there made his appeal to them against the Benchers of the Inn to which he belonged ; and that he then deliberately intended to withdraw a matter which related to his honour and character from its proper tribunal to the tribunal of the public, which never could fairly decide upon it, is plain from the last words of the speech which Mr. Seymour delivered upon that occasion, and which is set out upon this record :—

"Now, gentlemen," he said, "I have done. I have gone over the various points which fairly, or unfairly, have been pressed upon your attention, and upon which I have come down, though late, to Southampton in the honest hope that I might receive from you a verdict such as would tell at once to the public that, whatever cruelty I have encountered elsewhere, however the dirty fingers of certain members of my own profession have been employed in raking up the scandal of the past for the purpose of dragging up something to damage my repute; yet that you sympathized with your representative, that you accepted the result, that you saw me still a member of an honourable profession in spite of malice and jealousy, and of political hate, still holding the rank which by such hard struggles I attained, and that you would, by your determination, and by your pronounced opinion to-night, trample for ever upon this cruel attempt to call public attention to a matter which hitherto, at least, has been confined to a more limited circle, and has never yet been brought forth and laid before the glare of public day."

He appealed to the public through his friends and supporters at Southampton. He must have known perfectly well, considering the position he then held at the Bar, and in the House of Commons, that every word he said would be taken down by reporters, and that it would appear the next day in the *Times* newspaper, and he does not take exception to one word in the report which was furnished to the columns of that journal. We have him then appealing to the public against the Benchers of his Inn of Court, the jurisdiction to which he had submitted himself when he became a member of that Society, the jurisdiction which he knew to have been exercised in his case with very great leniency and forbearance. Gentlemen, he was not content with appealing to the people at Southampton, and to the public generally, but he took upon himself on that occasion to attack the Benchers of his Inn. "I was," he said, "upon fifteen different occasions before the Benchers of my Inn, and I stood practically before fifteen different tribunals, because upon no two occasions were my judges the same. The examinations were conducted within closed doors. I would to God they had been conducted in the broad light of day, and before the face of my constituents and the country; they were conducted by men sitting down after dinner, varying in their numbers and attendance, and sometimes postponing the inquiry upon the most trivial grounds." So that he went down to Southampton with the deliberate purpose of attacking gentlemen of the highest honour and character, as if they had displayed the same feeling which he charges upon the members of his Circuit, and had determined to pursue him, through motives of jealousy, and to work his destruction.

Now, gentlemen, let us see (because it is right it should be known) who the members of the Bench were. The members of the Bench who took part in that inquiry were Sir Laurence Peel, the late Chief Justice of Bengal; Mr. Greenwood, a Queen's Counsel, and solicitor to the Treasury; Mr. Bagshawe, a Queen's Counsel at the Chancery Bar, now one of the County Court Judges in Wales; Mr. Karlake, a Queen's Counsel and one of the leaders of the Western Circuit; Mr. Anderson, a Queen's Counsel, a member of the Chancery Bar going no Circuit; Sir William Alexander, a Queen's Counsel, the Attorney-General to the Prince of Wales, and one of the leaders of the Oxford Circuit; Mr. O'Malley, a Queen's Counsel, and one of the leaders of the Norfolk Circuit; Mr. Thomas Chambers, a Queen's Counsel and Common Serjeant of the City of London; Mr. Hawkins, a Queen's Counsel and one of the leaders of the Home Circuit; Mr. Green, a Queen's Counsel, and a member of the Chancery Bar; Sir Frederick Slade, a Queen's Counsel, and one of the leaders of the Western Circuit; the present Queen's Advocate, then Dr. Phillimore; Mr. Mills, a Queen's Counsel, and one of the leaders of the Norfolk Circuit; Mr. Coleridge, a Queen's Counsel, and one of the leaders of the Western Circuit; Mr. Rodwell, a Queen's Counsel who practises at the Parliamentary Bar, and a member of the Home Circuit; Mr. Montagu Smith, a Queen's Counsel, and the leader of the Western Circuit; Mr. Bovill, a Queen's Counsel, and one of the leaders of the Home Circuit; Mr. Monk, a Queen's Counsel, and one of the leaders of the Northern Circuit; Mr. Hoggins, a Queen's Counsel, and one of the leaders of the Northern Circuit; and my learned friend, Mr. Kewles, a Queen's Counsel, who had formerly been a member of the Northern Circuit, but who has thought right to retire from the practice of his profession on the Northern Circuit, having long been the leader of that Circuit, and in very large business. There are two other gentlemen, one a conveyancer, Mr. Hopley White; and another gentleman, Mr. Reynolds, who has retired from practising the profession. Such was the tribunal before which Mr. Seymour appeared, and I ask you if it would be possible to assemble the same number of gentlemen from any profession, or from any number of professions, who would be more likely to arrive at a fair and just conclusion on the conduct of a member of a society to which they belonged than these gentlemen would be. Mr. Seymour was not content with appealing against them in the way I have just read to you from his speech, but when they were forced by his appeal to the public to screen their judgment, that

is, to put it up in the Hall, he sent a letter to them which, he says, was written on the 3rd of February, and which he calls a protest, and that letter or protest he afterwards sent to the *Times* newspaper, in which journal it appeared. Let us see what he says in that letter respecting the gentlemen who had heard his case as Benchers of his Inn :—

“There is another subject to which I feel bound to call your attention. You have held fifteen meetings, and in no single instance has your parliament been composed a second time of the same members as any previous parliament. In point of fact, therefore, I have been tried before fifteen different tribunals. Your numbers have been equally irregular, varying from a maximum of eighteen to a minimum of seven. One of your number first attended at the fifth meeting, one first at the sixth, two at the ninth, two at the tenth, and one at the thirteenth ! The following is an analysis of the attendance of all the Benchers :—Two attended fifteen meetings, two attended fourteen, one attended twelve, two attended eleven, one attended ten, two attended nine, two attended eight, two attended seven, three attended six, two attended five, one attended four, two attended three, two attended two, and two attended one. Here is a remarkable disregard both of the spirit and letter of the wise rule of the Society which requires the attendance of the same numbers on every adjourned hearing of an inquiry into an accusation against a barrister.”

Are those fit observations for a barrister of an Inn of Court to make, and to make public by sending them to the *Times* newspaper, unless he intended to provoke a full discussion by the public in the public press of all the matters to which those observations related ? Was it right of Mr. Seymour, when he might have appealed to the Judges, or asked the Judges to entertain his appeal against the reprimand of the Bench, thus to attack the Benchers before the public ? I apprehend not ; but if he thought right to do so it is not reasonable of him to complain of any of the consequences which have resulted from it.

Let us now see what the sentence pronounced upon him by the Benchers was. It is a sentence which gives rise to questions of very serious importance,—questions in which the conduct of the Benchers is as much involved as the conduct of Mr. Seymour.

“The Masters of the Bench have carefully considered the voluminous evidence and documents which have been brought before them, and have come to the conclusion that the charges in the cases of ‘Parker,’ ‘Coutts,’ and ‘Robertson,’ respectively, are not proved, and that the charge of a proposal to hold briefs for an attorney in

liquidation of his costs payable by you, is proved. The facts and circumstances which are disclosed, fully satisfy the Masters of the Bench of the necessity for this inquiry, and they regret to add that they cannot accompany their intimation to you of their decision on the three charges first named with any declaration that your conduct is not liable to censure ; on the contrary, they have the painful duty to perform of stating to you that they find much worthy of severe condemnation even on the most favourable construction of your actions. That in Parker's case, on your own statement of your conduct, evidence appears of a want of open dealing towards, and of concealment from, Mr. Parker. Mr. Parker's agreement with you on your own version of it, was inconsistent with your substitution of your *credit* for the money you undertook to add to his own, and with the use of his money for any purpose unconnected with the printing scheme. The breach of your agreement in these two respects was not communicated to Mr. Parker, whose consent alone could have justified the course to which you actually resorted. The Masters of the Bench are also under the painful necessity of declaring their opinion, that the settlement of Mr. Parker's action, while the charges of fraud included in it were, in the opinion of the Bench, *not* only not withdrawn, but were strongly re-asserted, as it was conduct calculated to destroy character by exciting suspicions that charges which were not boldly met could not be gainsaid, was an arrangement to which a right-minded man, even in the hour of heavy pecuniary distress, would not have submitted. They are compelled to add that no solid ground presents itself on the evidence in justification of the affidavit which was made by you for the purpose of postponing the trial of the action in question. With respect to Captain Robertson's case, there is found in your statements at various times, in relation to that case, a want of consistency which indicates some recklessness of assertion. Your assertion, so often repeated, that you had generously taken upon yourself very large liabilities which did not in any way belong to you, as you assert yourself to have been totally unconnected with, and innocent of, the transaction termed 'rigging the market,' is at variance with the statement in your letter to Mr. Lefroy, that the debt was as much Captain Robertson's as your own. The Masters of the Bench are unable to reconcile an act which, according to your version of it, would have been one of romantic generosity and self-devotion (scarcely consistent with your duties to others and with the reasonable claims of justice) with other portions of the evidence, and with the ordinary presumptions which arise from your conduct as disclosed throughout these painful transactions. The fourth charge relates to a matter of a different character. The Masters of the Bench are glad to find that it is not justified by you, but the grounds on which you attempted to palliate your conduct are not satisfactory to them. Your proposal was one most improper from a barrister to an attorney, and invited a breach of duty on the



part of the attorney; a client would never be likely to suspect that his attorney, from secret motives of interest, was selecting an advocate for him whom otherwise he might not have chosen. It is conduct, therefore, promoting deception, and likely to generate suspicion where confidence should prevail. If such a practice were tolerated, it would lower the character and honour of both branches of the profession, and would be injurious to the public, not only by reason of such debasement, but also by its tendency to introduce into, or maintain in, the practice of their profession men more distinguished by the pliancy of their principles than by the gifts of nature, improved by an industrious and honest pursuit of eminence by honourable means."

Gentlemen, do not deceive yourselves—what I have now read to you is the only part of what Mr. Seymour calls the libel which gives him the smallest pain. That is the real libel. If Mr. Seymour had not thought proper to make it public, Mr. Butterworth might not perhaps strictly have had a right to print and publish it. That is the libel. Take that out of the article, and there is nothing in it that would do serious damage, or perhaps any damage, to a gentleman in Mr. Seymour's position.

Now let us see what observations have been made by Mr. Seymour's Counsel upon that libel. I cannot but regret (and I say it with the most unaffected respect for my learned friend Mr. Lush) the sort of apology which he has made for Mr. Seymour in respect of that last charge, the charge of offering to hold briefs for an attorney in any Court in order to discharge an amount of costs due to him. My learned friend seems to think that although it was a breach of etiquette, it may be justified on a principle of honesty.

LORD CHIEF JUSTICE COCKBURN:—No—not justified—palliated.

Mr. SERJEANT SHEE:—Palliated, then.

LORD CHIEF JUSTICE COCKBURN:—I should have been very sorry to hear Mr. Lush say that it was justified.

Mr. LUSH:—I never said that it was.

Mr. SERJEANT SHEE:—Then I beg my friend's pardon—that it was palliated by a principle of honesty. I think, gentlemen, that you will be of opinion, for the reasons given by the Masters of the Bench, that it is conduct which is wholly inexcusable. I cannot avoid adding, that even feelings of honesty need not have led Mr. Seymour to that breach of professional etiquette. Mr. Seymour was at that time, according to his own statement, a prosperous member of the Bar. Surely he might have paid the costs out of fees received from other attorneys besides Mr. Brown. There was no difficulty in his doing that. I will not dwell longer upon that part of the sentence

pronounced upon him by the Bench ; his misconduct in that respect remains entirely unexcused.

Gentlemen, my learned friend says that the rest of this libel ought to have been justified by the defendant. I apprehend that it will be quite plain to everybody who reads it, that Mr. Seymour must have known perfectly well that it was practically impossible that the defendant should justify any of the substantial parts of it. Just conceive what he must have done had he been advised to adopt that course. He would have had to take every allegation in this sentence of the Benchers, and to have asserted the truth of all the material parts of it; for instance, he would have had to take issue upon the question, whether there was a necessity for the inquiry; whether there was much in his conduct worthy of severe condemnation; whether there was evidence of a want of open dealing towards, and concealment from, Mr. Parker; whether Mr. Parker's agreement with Mr. Seymour was inconsistent with the substitution of Mr. Seymour's credit for the money which Mr. Seymour undertook to add to Mr. Parker's to promote the printing scheme; whether it was true that no solid ground presented itself on the evidence in justification of an affidavit which Mr. Seymour had made for postponing the trial of the action brought by Mr. Parker against him to recover the £500; whether, with respect to Captain Robertson's case, there was in Mr. Seymour's statement in relation to that case, a want of consistency which indicated some recklessness of assertion, and whether it was true that he had generously taken upon himself very large liabilities (amounting, I believe he says now, to £40,000) not in any way belonging to him, as he asserted himself to have been totally unconnected with, and innocent of, the transaction termed "rigging the market." All this, according to my learned friend, ought to have been put in issue. That is to say, that the defendant, Mr. Butterworth, in order to defend himself in this action, ought to have undertaken to go through all the evidence which had been heard before the Benchers of the Middle Temple, with a view to prove the truth and justice of the observations which the Benchers of the Middle Temple had made. Why, gentlemen, Mr. Seymour knew perfectly well that it was quite impossible for Mr. Butterworth to do anything of the kind. Mr. Seymour also knew that Mr. Butterworth could not be fairly called upon to do so, because in truth Mr. Seymour had himself made the whole matter the subject of public discussion, by inviting public discussion to it, and had thereby challenged those who write in



Mr. Butterworth's magazine to re-open a matter so intimately connected as this was with the honour and character of the Bar.

Gentlemen, there is one other observation which my friend Mr. Lush made, to which I venture humbly to take exception. My learned friend, Mr. Lush, without distinctly saying so, seemed to suggest that a distinction ought to have been made by the Benchers of the Middle Temple between Mr. Seymour's professional and his commercial character, and he seemed to think (though he did not distinctly say) that they had stretched a point when, looking beyond the professional character and conduct of Mr. Seymour, they inquired into his commercial transactions. Gentlemen, I apprehend that that is a great mistake. It is the duty of the Benchers of the Inns of Court to take care that the Degree which they confer shall not be used as a credential by a professional impostor to obtain the confidence of the public. If they find that a man after he has been called to the Bar has disgraced himself by conduct in other pursuits, surely they ought not to allow him to have that opportunity of doing mischief which his position as a barrister gives. Surely, when the public know or believe that no one is allowed to be a member of an Inn of Court, or a member of the profession of the Bar, who is proved to have been guilty of dishonourable conduct—and dishonourable conduct is charged against one of the members of their Inn—it is their duty to take cognizance of the charge, whether it relates to professional matters, or matters unconnected with the profession. I apprehend it was the duty of the Benchers of this Inn of Court, when these matters came before them, to inquire into all the circumstances of the case, and to ascertain, aye or no, whether Mr. Seymour had been guilty of that which had been charged against him.

Let us now, gentlemen, proceed and see what the defendant's course is. Not justifying the libel, because it would have been impossible to justify this, the material part of the libel,—namely, the judgment pronounced by the Benchers,—he defends himself on the ground that the judgment of the Benchers was a fair matter of public discussion, and that it had been made public by Mr. Seymour himself. The writer of the second article read by my learned friend, says :—

“ We shall place the article in question confidently in the hands of a jury, as a fair and reasonable comment on notorious facts, written with the same knowledge of the circumstances as the whole public possessed, mis-stating nothing, suppressing nothing, and consisting, in a great degree, of materials supplied by Mr. Digby Seymour himself.”

Now, if the publication of this article is within the limits which are here laid down, I apprehend that the defendant is in law justified, and that you ought to say he is not guilty upon this record. If you should think that the article is not within those limits, that it does not relate entirely to matter which in its nature is a fit subject for public discussion, or matter made public by Mr. Seymour himself, you may have to consider to what damages Mr. Seymour is entitled; but if you are satisfied that the matters discussed are matters of public interest and importance, and that in discussing them Mr. Butterworth, or the gentleman who wrote this article, has not deviated from the fair path of public discussion to asperse Mr. Seymour's private character, then I apprehend Mr. Butterworth is entitled to your verdict, and, subject to anything my lord may tell you, I also submit to you, and to my lord, that if there be any matter treated of or dealt with in this article which is not in its nature public, but matter rather for a domestic forum, yet, if Mr. Seymour has made it public, if he has invited public discussion to it, the proprietor of the *LAW MAGAZINE* had a good right to discuss it, and cannot be made liable in damages for having done so.

Allow me, gentlemen, for a moment to call your attention to the general character of this magazine. It is confined entirely to matters of legal interest. You will see at a glance what the scope of the publication is. I will take the articles in the next preceding number, and the articles in the number complained of: "Sir John Patteson," (the late eminent Judge,) "International General Average," "Ancient Irish Conveyancing," "The Rights, Disabilities, and Usages of the Ancient English Peasantry," "Inner Temple Benchers," "Disbarment of Edwin J. James, Q.C.," "Sugden on Powers," "The Affair of the Trent," "Practice of the Divorce Court," "Disunion of the United States," "Right of Secession." Then the articles in this number are—"Holy Orders as Disqualifying for the House of Commons or the Bar," "International General Average," "The Rights, Disabilities, and Usages of the Ancient English Peasantry," "The Machinery of Legislation," "The Science of Civilization," "On Equitable Interests in Ships," "The Law of Judgments," "On Charitable Trusts," "On Insanity and Prodigality," "Decrees Nisi in Divorce," and then comes "Case of W. Digby Seymour, Q.C., M.P." You see, gentlemen, it is a magazine and review, which professes (and this is the twenty-fifth number of a new series, for I think it has been in existence for thirty years,) to discuss all questions interesting to the profession of the law, connected with the law of the land, the law of foreign countries, and

the law of nations, and before this number of it appeared, the conduct of an important branch of the profession, nay, of two most important branches of the profession, the conduct of the Benchers of the Middle Temple, and of that large and important subdivision of the Bar, the Northern Circuit, had been made the subject of public discussion and condemnation by Mr. Seymour himself, insomuch that the Benchers of the Middle Temple had been arraigned before the public as persons who had either done great injustice to Mr. Seymour, or great injustice to themselves, and to the profession of which they were members; it being broadly asserted in various public newspapers, and in other publications, that if the charges on which Mr. Seymour had been censured were true, and if that censure was deserved, the Benchers of the Middle Temple had not been true to their trust, and that they ought to have disbarred him.

Next, let us see what are the public questions involved in this inquiry, that we may be enabled to form a fair opinion of the manner in which they are discussed.

I submit to you that one of the public questions raised by the conduct of Mr. Seymour, and by the documents to which he had given publicity, was this—and it is a very serious one—Are the Benchers of the Inns of Court a body to which the discipline, the professional government, the supervision and correction of the members of the Bar can, with a due regard to its honour and the protection of the public from professional imposture, be safely entrusted? That was an important public question, raised by what had taken place in Mr. Seymour's case, and by the publicity which Mr. Seymour had given to it, and I am much afraid that there does exist a very strong opinion, that if that censure passed upon Mr. Digby Seymour was deserved, the Benchers of this Inn of Court faltered in the performance of their duty, and that they ought to have disbarred him. It is plain that such a question as that was a very fit and proper question for public discussion, and I much fear that, provided their censure was sincere and honest, there is reason for saying that the Benchers were misled, by pity for Mr. Seymour, from the course which they ought to have taken—that of disbarring him. Now that that is the impression which existed in the mind of the person who wrote this article seems to be perfectly clear, and it is one which he had, as I submit to you, a right to state, and a right to enforce by all fair arguments, abstaining, as it was his duty to abstain, from any observation which did not properly belong to the question, and any observation tending to impugn the private character either of the members of the Bench or of Mr. Seymour.

I will now request your attention to that part of the article which relates to that which I have called an important public question:

“It cannot be denied that the scandals which have lately been afloat concerning more than one well-known member of the Bar have shaken the public opinion, hitherto prevalent, in the honour and high tone of the profession. Scarcely had Mr. Edwin James vanished from the scene, when two other learned gentlemen, one of whom is a scholar and a genius, and the other, though neither of these, still a barrister in some practice, and lately elevated to the rank of Queen’s Counsel, became the subjects of a notoriety, painful to themselves, and discreditable to the whole profession.”

Then follows a long passage about the mischief which arises from allowing gentlemen to be called to the bar in order to obtain second-rate public offices, who do not possess sufficient legal knowledge to qualify them for practising at the bar. That has nothing to do with Mr. Seymour ; it is, perhaps, an evil which would be best remedied by not appointing men to such offices until proof was given that they had something more than a mere nominal standing at the bar, and that they had made themselves acquainted with the principles and practice of their profession. Then, upon this first question, I do not find anything of any importance until we come to the close of the article, and there I find that the person who wrote it does plainly express an opinion, which he had a perfect right to do, and which is entertained by a great many besides himself, that if the censure was justified—if, mind—I do not pretend to say it was—Mr. Seymour ought to have been disbarred. He says :

“It is not our intention to enter into any consideration of the specific charges brought against Mr. Digby Seymour, because, like the rest of the public, we are not yet in possession of the means for deciding on them impartially, with a full knowledge of the facts. But when we consider that we have on the one hand the deliberate opinion of a number of honourable and distinguished men, who have gone fully into the case ; and, on the other, the bare assertion of innocence by an interested person, who declines to take the plain course of publishing a complete statement of the circumstances—and that person one who publicly stated that the Benchers had given a verdict in his favour, when he held their condemnation in his hands—we cannot hesitate for a moment as to the verdict we must pronounce. Until Mr. Digby Seymour has shown to the public, by a full and ungarbled publication of the evidence given before the Benchers, that their judgment was unjust, we must continue to believe that it was delivered in accordance with the truth, and that the censure therein was merited.”

Then he goes on to say, in another part:

"We observe that in the last epistle the writer expresses some regret that the editor who fell into this (to a layman) very natural mistake, had not violated the privilege of Parliament thereby, and thus afforded to Mr. Digby Seymour the opportunity of laying the whole matter before the House. But why wait for a breach of privilege? Honourable members have, before now, become the subjects of unjust suspicions, and have, thereupon, themselves moved the House for the appointment of a Select Committee of Inquiry, with the full conviction that they would thus clear their scutcheons of blot. If Mr. Seymour be indeed enrolled, as he assures us, among the army of martyrs, why does he not take the same simple and straightforward course? Or, if his native modesty prevent him from obtruding himself on Parliament, why should not some other M.P. clear the character of the House by moving for such a committee, and instituting such an inquiry? By all means let us have some investigation; let the chairman of the committee send for books, persons, and papers; let the members sift the whole matter to the bottom; and when Mr. Digby Seymour has come out of the scrutiny, not merely as white as wool, but with a refulgent crown of martyrdom to boot, let the House at once abolish the Benchers—and the Bar too; if it lists—and let it farther transmit the sufferer's claims to the canonizing council which is shortly to assemble under his Holiness, in order that St. Seymour, of Sunderland and Southampton, may be duly added to the calendar. Let it not be supposed, however, that we are prepared to record any approval of the conduct of the Benchers. We have not the slightest doubt that they acted in this painful business with perfect integrity, and with the best intentions, but it is impossible to acquit them of foolishness and error. In the first place, we are clearly of opinion that if they considered Mr. Digby Seymour guilty of even one of the charges brought against him, (and they admit that they did so,) they were bound to have disbarred him. Censure, however abjectly received when it was pronounced, was no adequate punishment for such an offender. Very recently, an unknown member of the Bar has been expelled from its ranks for offences certainly not greater than the charge which the Benchers say was proved against Mr. Digby Seymour. Is it right the public should suppose that, while the whole severity of power is brought to bear against the weak, there is a dread of enforcing discipline in the case of a Member of Parliament and a Queen's Counsel? In the second place, it is quite clear that the judgment of the Benchers ought to have been screened immediately after it was pronounced. We cannot conceive what reason could be given for maintaining secrecy. And, thirdly, we are strongly of opinion that when Mr. Seymour challenged the publication of the evidence, it should at once have been given to the world. The honour of the Bar and the dignity of the Bench demanded such a course, and we deeply regret that ill-advised counsels to the contrary

have prevailed in the parliament chamber of the Inn. We cannot, however, concur in the idea that investigations before the Benchers into the conduct of every accused member of the Bar should necessarily be held in public. The adoption of such a rule would, we think, be a great evil. The jurisdiction of the Bench is exercised in what has been justly termed 'a domestic forum,' and the nature of such a tribunal is essentially different from that of an ordinary court of law. To parade questions of etiquette, and even of morality, before the public would be often unjust to the accused, and would add no security to the discipline of the profession. But we are alive to the mischief occasionally produced by the present practice, especially when an unscrupulous man makes capital out of the very privacy which has alone saved him from utter ruin. Perhaps it would be well to give to the accused in all cases the *option* of a public hearing. In the proposal which has been made for a conjoint committee or council of the four Inns, to conduct inquiries of this kind, and to administer the discipline of the Bar, we most entirely concur. Such a measure would reassure the public as well as the profession, and have a good moral effect ; and, as the institution of such a body would be only following up the precedent already set by the establishment of the Council of Legal Education, which has worked admirably, we may hope that the Benchers will see the wisdom and expediency of making this step in advance without any further delay."

Gentlemen, I say that that part of the article at least is a discussion, and a very proper discussion, of the conduct of the Benchers. The object of it is to show that if they thought themselves justified in passing their censure, it was due to the profession and the public that they should disbar their offending member. It tends to show, no doubt, that they had taken, from the best and most honourable motives, a very lenient view of the case, and that the observations made upon their conduct by Mr. Seymour, at Southampton, and in the press, were wholly undeserved.

Gentlemen, the next question which is discussed in this article, is one, if possible, of still greater importance. I really do not know what public question, not involving national honour, or national disgrace, can be of more importance. People may entertain different opinions about it ; but I submit, with the utmost confidence, to you, that it is a matter of great public interest and importance to ascertain ; Whether the minor patronage of the law is honestly bestowed upon deserving men, or given away, as respects gentlemen of the long robe in Parliament, without inquiry as to personal and professional character, to obtain from them, or to secure from them, an obsequious and obscure adhesion to the Government of the day ; and whether



the still higher patronage of the Crown, in relation to the profession of the law, the bestowal of the honours of the profession by the Lord Chancellor, is influenced by fair and honest, or indirect and political motives. I can hardly conceive a question of purely domestic interest more important than that. I shall endeavour, in the few observations that I have to make upon it, to discuss it with the caution and the justice with which it ought to be discussed; but that it is a matter of grave public interest and importance, no one can entertain a doubt.

Now let us see what the facts before the writer in the *LAW MAGAZINE*, were when he took up his pen to write this article. A gentleman, comparatively speaking a mere junior on the Northern Circuit, (when I say a mere junior, he was of eight years' standing; but there were plenty of juniors there in good practice of fifteen and twenty years' standing,) had, within two years after he became a Member of Parliament, been gratified by an appointment to what, to a man of his standing at the Bar, was very considerable promotion—the Recordship of Newcastle-upon-Tyne. Mr. Seymour, when I was questioning him yesterday, seemed inclined to defend himself against a supposed charge of having used his Parliamentary position to obtain that appointment, as if I was imputing to him some personal dishonour or disgrace in so doing. I meant nothing of the kind. It would be idle and unjust to attack the personal honour of any gentleman in Parliament who accepted, or made it known that he was willing to accept, an appointment of that kind; but it is quite plain that a great scandal had, before this article appeared, arisen, and that the scandal was occasioned principally by this circumstance—that a gentleman, a member of our profession, of only eight years' standing at the Bar, much junior to many eminent men on his own Circuit, had been appointed to a comparatively high office—the Recordship of Newcastle-upon-Tyne—and appointed, as it turned out, just at the very time (of course it was not known to the Government, of that I am quite sure, or they would not have done it) when he was engaged in transactions on which he must look back with regret, and in respect of one of which he knows that he was connected with a number of persons professing to be gentlemen, but who could have been nothing better than swindlers. Mr. Seymour was so engaged in the years 1852, 1853 and 1854; and, at the end of that year, in the month of December, he was appointed to the office of Recorder of Newcastle-upon-Tyne. Now, far be it from me to say that Mr. Seymour was not competent to discharge the duties of that office. There can be no question that

Mr. Seymour is a gentleman of considerable ability. There can be no question that, with an honest intention to discharge the duties of that office properly, (and I do not impute the contrary,) he is quite competent to do so. It is not that Mr. Seymour was incompetent. It is not that Mr. Seymour had obtained the office by any unworthy means, or by any deliberate bargaining about his votes, that is the matter of complaint in this article; the thing that is complained of in the article is a regular long-established system since the time of the Reform Bill, of giving the minor patronage of the profession to gentlemen of the long robe who are in Parliament, to the exclusion of men often much more deserving of, and more competent to discharge the duties of such offices. Mr. Seymour yesterday, when I asked him what was usual in these matters, referred to two other cases in which he said (and I do not suppose he would tell us what he did not know to be true) the same thing had been done on his own Circuit for men of less than his standing in 1854. That is the very evil which this article complains of; that, instead of ascertaining—as I say it is the duty of the Crown, and of the Government of the country, to ascertain—who are the best men, by their position at the Bar, their personal character and attainments, for important offices, the offices are given to gentlemen who have seats or connexions in Parliament. That is the subject of complaint. It does not refer merely to offices; it refers expressly, as we shall find presently, to Government briefs; and there is no doubt, and it must be openly said, without imputing personal dishonour, as respects the practice, either to the recipient or to the individual who gives the preferment, that it is a great mischief to our profession that really deserving, hard-working men and sound lawyers, some of them perfectly fit to be raised to the Bench, should be deprived of a fair share of such appointments, and that they should be given to men of whom nothing is known, who have not been long enough at the Bar to make it perfectly certain what their character is, and what their attainments are, in preference to persons who ought to be promoted. I do happen to know that, as to some minor offices not in the gift of the Government, but of the Judges, the learned Judges, or some of them at least, have taken great pains to ascertain from the seniors on their respective Circuits what men upon them there were who really deserved, on account of their learning, their attention to the profession, and their personal character, such patronage as is at the disposal of the Judges; and if the Government of the country would do the like, depend upon it such scandals as have arisen in this case never could take place at all; but, if they will, merely



because a man is in Parliament, and because he has been for a couple of years a fluent speaker on their side of the House, select him from a crowd of able and distinguished men, for one of the best preferments on his Circuit, and the appointment turns out unfortunate, and gives rise to scandal and disgrace, surely the press, and more particularly that portion of the press which devotes itself to the discussion of legal questions, has a right to protest against it boldly, and renders good service to the country by so doing. Gentlemen, if such conduct should become a system, and be permitted to continue without observation, the time would not be distant when men, without distinction here, and without distinction in Parliament, merely because they have seats in Parliament, would be thrown over the heads of the deserving members of the profession, and raised to the Bench on which my lord now sits. Whenever, if ever that time shall come, or serious apprehension of its having come shall be entertained—whenever the time shall come that the Bar of England believes, and has reason to believe, that, merely because a man has a seat in Parliament, and is of unstained character, he will be raised to the Bench ; why, then, I say, the heart of the Bar will be taken out of it, and there will be no adequate incentive for the laborious study and the long devotion to the profession which are necessary to insure success. Gentlemen, it is in vain for Mr. Seymour to think he can bring such an action as this without putting the whole profession upon its trial, and provoking a full vindication of it. The truth must be spoken. Happily, hitherto, no man has been raised to the Bench who has not been a man of merit, and known to be a man of merit. No man has been raised to the Bench who has not on the Bench shown himself capable of discharging its duties ; but if such a system is allowed, without complaint, to take root, as that of appointing to the Recordships of places like Leeds, Liverpool, Newcastle, and Brighton, men who do not deserve such appointments, and it is passed over without observation, the convenience of parliamentary government will soon extend, for political objects, the concession which is thus made by the public and by the public press ; and the effect of that will be to involve the profession in ruin, and very much to lessen the confidence which the people place in the fair administration of justice.

Gentlemen, let us now see if the main object of this article is not to complain, instancing Mr. Seymour's case as proof, of the mischief to which it leads, of passing over hard-working deserving men, in order to give such preferments as the Recordship of Newcastle to men of inferior position in the profession.

Gentlemen, while putting the Benchers of the Middle Temple upon their trial, through Mr. Butterworth, Mr. Seymour puts the whole profession upon its defence. I repeat, that I believe Mr. Seymour to be perfectly competent to discharge the duties of Recorder of Newcastle, and I will not suggest or insinuate that which I do not know, or which I have no reason to believe. I never knew anything about Mr. Seymour's quarrel with his Circuit until I read this book the other day, it not having been sent to me by Mr. Seymour, and I will not suggest that Mr. Seymour is not as anxious to discharge the duties of his office of Recorder honestly as any man who might have sat at Newcastle in that character. But it is right that the jury and the country should see what sort of men were passed over in order to give this "second-best" Recordership to Mr. Seymour. The late Mr. Addison, Mr. Adolphus, Mr. Aspland, Mr. Serjeant Atkinson, Mr. Tindal Atkinson, Mr. Serjeant Bain, Mr. Blackburn (now Mr. Justice Blackburn), Mr. Bliss, Mr. Cleasby, Mr. Crompton (now Mr. Justice Crompton), Mr. Drinkwater, Mr. Forsyth, Mr. Gathorne Hardy, Mr. Headlam, the two Messrs. Henderson, Mr. Hugh Hill (lately Mr. Justice Hill), Mr. Hindmarch, Mr. Edward James, Mr. Knowles, by whom I may say, that although he would have cared nothing for the emoluments of the office, it might have been felt as an honour and a distinction had such an office, gracefully and without solicitation, been conferred upon him, Mr. Manisty, Mr. Pashley, who is unhappily now dead, a man eminently versed in Sessions Law, and in all the learning which would have enabled him to have discharged the duties of the office properly, and who was afterwards appointed Chairman of the Middlesex Magistrates, Mr. Pickering, Mr. J. Pollock, the late Judge of the County Court at Liverpool, Mr. Watson (the late Mr. Baron Watson), Mr. Webster, Mr. Wilde (now Mr. Baron Wilde), and Mr. Serjeant Wheeler. Those gentlemen were all passed over, and very few of them indeed would have declined to accept the appointment had it been offered to them. It is very easy to resign an appointment when it becomes inconvenient to hold it, and it is always a credit to have such an appointment as that conferred upon you. Now all those gentlemen were on the Circuit before Mr. Seymour joined it, most of them are still in full health and strength, and in the active practice of their profession. Some of them were on the Circuit when Mr. Seymour was born, and they were all set aside to give him this, the second-best Recordership upon the Northern Circuit; and I submit to you, gentlemen, that

the main object of this article is to complain of a system which discourages the Bar of England, which leaves no chance for hard-working, respectable men, but which gives every chance to men who happen to get into Parliament, and are willing to support the Government of the day.

Let us now see what is said upon that question. I say it is a great public question and a proper subject for discussion in this magazine.

“But,” says the writer of the article, “there is still another evil influence at work to which we allude with hesitation, seeing the delicacy of a subject which is in some degree foreign to our province, we mean the relations that have grown up between the Bar and the House of Commons. In former times, when the difficulties of finding a seat in Parliament (except for the fortunate nominees to pocket boroughs) were much greater than at present, a barrister as such seldom entered the House, unless he were a candidate for high legal office, or was capable of taking the post of a leading lawyer in the Opposition. In those days the representatives of the Bar were few in the Commons, but they were nearly always able and eminent men, whose legitimate ambition was fixed on the higher prizes of the profession. The House still contains such men, and the Bar has still reason to be proud of such representatives, but they now form only a small proportion of the total number of barristers in Parliament. Since the passing of the Reform Act threw open a number of popular constituencies, the array of ‘gentlemen of the long robe’ in the House has largely increased, and we believe at the present moment upwards of seventy of the Bar have added the cares of legislation to their labours in practice.”

That is a mistake and a very great mistake. I have, for the purposes of this cause, looked over the names of all the Members of Parliament, and I do not find more than twenty who have the least pretension to be called barristers in practice. It does undoubtedly happen that for some of the higher offices, Secretaryships of State and Under-Secretaryships, it has been found necessary to resort to our profession for competent men, and in that way the number of the members of the Bar who are in Parliament amounts to seventy. There are not above twenty, at the very utmost five-and-twenty, in practice, and if you divide that number between the two political parties in the State, you may judge what chances of snug appointments and retainers there are for gentlemen of the long robe who happen, from some lucky accident or local connexion, without much ability either for Parliament or the Bar, to obtain seats in the House of Commons.

"Whether," continues the writer of the article, "these legal gentlemen make the best representatives, is a question on which we do not enter; the fact that they are returned by free and intelligent electors constitutes a presumption that they do so; it is their influence on the *morale* of the Bar with which we have to deal. Now, as it is certain that the great majority of the Sanhedrim we have alluded to can never become Solicitors-General or Puisne Judges, it follows that the current price of a barrister's parliamentary support has fallen terribly of late years. The glut in the market has seriously diminished the value of the article. In bygone days we may presume that a counsel who had obtained a seat in the House yielded his political virtue to nothing less than a descent by the Jupiter of the Treasury in a golden shower of judicial dignity, or a law officer's emoluments; but now-a-days votes are won, and a too demonstrative independence is wooed away, by the humbler agency of silk gowns, second-class Recordships, and even the obscure counselships to Government offices."

The question here is not whether this be literally true, but whether, if it be in substance true, it is not a disgrace to the Government of the country and a serious injury to the Bar. It is not an attack upon liberal, nor an attack upon conservative Governments; they both do it when they have the opportunity. Is not that a fair subject for public discussion? Is it decent that gentlemen should present themselves here with Government briefs in their hands who are not in the first rank among the junior members of the Bar, or if in this front row, not among those who have been long distinguished, or distinguished in any noticeable degree? I apprehend not. The abuse of the Government patronage is a fair and just subject of complaint; it is a matter which affects the independence of the Bar and the character of its members in the House of Commons, for no man who accepts such offices and briefs can comfortably retain them and stand in opposition to the Government.

"What effect," says the writer, "this new development of patronage may have on a House which professes to be jealous of any official encroachment on its independence we do not care to inquire, though, considering the number of junior barristers in Parliament, and the startling amount of places that may now be brought to bear upon their votes, the subject may not be unworthy of consideration by those interested in the purity of our constitution. But viewing the question as relates to the Bar, we have no hesitation in saying that the practice at present pursued, of using the House of Commons as a stepping-stone to inferior places in the profession, is fraught with evil. Hard-working and worthy practitioners who may not have either the means or the inclination to enter Parliament, see themselves continually passed over by far inferior men, whose claims to promotion have originated in the division lobby.

Speculative, adventurous juniors, who are not rising so fast as they fancy that their merits deserve, or whose characters require some fresh varnish, are tempted to make a bold dash at a constituency, and to prop up their professional fortunes by parliamentary interest. The moral tone of the Bar is lowered by spectacles of successful impudence, no doubt occasionally ending in some terrible and damning crash, but not the less demoralizing in their temporary glitter as they are degrading in their final infamy."

Don't suppose, gentlemen, from the observations I have made, that I hold it to be unworthy or unbecoming for a young member of our profession to take a seat in Parliament. Far from it. If he goes there with the fair and honest purpose of refuting the undeserved but too prevalent opinion of the comparative degeneracy of the English Bar, of becoming, while achieving distinction for himself, useful to his Sovereign and his country in public life, and of acting sincerely, honourably, and independently, I know no career more worthy of respect, or a fitter or nobler object of legitimate ambition. That, however, is a very different thing from what is complained of here.

"We have prefaced the special subject of our article with these observations because we believe that they are needed at the present moment, unpalatable and little flattering as they may be. The Bar will be lost in public estimation if scandals are to increase without any effort being made on the part of the profession to rid themselves of the generating causes; and when we are entering on a history which must be a subject of humiliation to every man of honour among us, it is well to state plainly that some at least of the moral evils afflicting the Bar are capable of removal by the exercise of professional opinion on the distribution of place and precedence."

The exercise of professional opinion on the distribution of place and precedence at the Bar! It would have about as much effect as the chirping of the cricket on the hearth or the sparrow on the house-top. None at all; it would be utterly and entirely disregarded; there is no protection for us against an evil which we all feel, but against which we have never until now had an opportunity of protesting—none whatever but in the bold outspoken freedom of the public press; the Judges cannot help us—they would if they could, but they have not the power to do so; except, perhaps, in the rare instance of a union in the same person of high parliamentary and judicial authority—they would not be listened to if they attempted it. The evil must go on; there is no chance of its correction, unless it be by the earnest, vigorous protest of public writers, selecting such occasions for making the protest as have

been offered, most unfortunately, by the scandals to which the conduct of Mr. Seymour has given rise..

Let us, gentlemen, now see in what way these observations are applied to the case of Mr. Seymour.

“We never were able to discover that Mr. Digby Seymour, during his first sojourn in the House of Commons, added in any appreciable degree either to the usefulness or the brilliancy of that assembly ; we are not aware that any measure was secured by his exertions, or any principle elucidated by his oratory, or any party at all benefited by his adherence, save in the matter of his vote. For this last he was rewarded with the Recordship of Newcastle, to the just dissatisfaction of the Bar, who thought that better men had been passed over for an unworthy political motive.”

Gentlemen, it is difficult, I know, to judge impartially of what is written about ourselves ; but if Mr. Seymour will candidly consider the circumstances under which he admits that he obtained the Recordship of Newcastle, he cannot but feel that, instead of being disposed of as it was, it ought to have been given to some person in the position which Mr. Atherton filled when it was offered to him, he being then of fifteen years' standing at the Bar, and in a most respectable position on the Northern Circuit.

“The worst evil attending a weak Government is the necessity under which it labours to catch every possible vote in any quarter, and its besetting sin is an improper distribution of patronage. Lord Palmerston's present administration has, probably, never numbered a working majority of twenty trustworthy votes in the House of Commons, and the political circumstances of the time have tended to diminish the ranks of ministerial supporters. It probably became necessary to secure every doubtful adherent, and this consideration may palliate, but cannot excuse, the promotion of Mr. Digby Seymour to the rank of Queen's Counsel. Even at the time of the appointment” (and for this we have Mr. Seymour's own authority in his speech at Southampton) “rumours were afloat in the profession that his conduct must form the subject of investigation by the Benchers of the Middle Temple ; and we have heard that Lord Campbell, shortly before his death, expressed his deep regret that he had been ever led by political pressure to promise a silk gown to the member for Southampton. If this be so, it furnishes a curious commentary on one portion of Mr. Seymour's speech at Southampton, in which he quotes the patronage of Lord Campbell as a proof of the purity of his professional career.”

My friend, Mr. Lush, complains that in that passage the writer of this article says, that Lord Campbell lived to regret, and express his regret, that he had been led by political pressure to promise a

silk gown to the member for Southampton. I do not know, gentlemen, whether Lord Campbell did regret it or not, but I know that he ought to have regretted it. It was in the last year of a long life, protracted beyond the ordinary number of years allotted to man. Lord Campbell was a great lawyer, and filled with high distinction the office which my lord now holds; but if Lord Campbell knew that these rumours were current against Mr. Seymour at the time he presented him to the Queen in the robe of a Queen's Counsel, to kiss her Majesty's hand, he did himself no credit, and he did the profession to which he belonged irreparable mischief. It now stands clear upon the evidence of Mr. Seymour, that before Lord Campbell gave Mr. Seymour the rank of Queen's Counsel, he had been refused the rank of Serjeant-at-Law. The rank of Serjeant-at-Law is given by the Lord Chancellor, as well as the rank of Queen's Counsel, but it is not given generally—indeed, I believe it is never given, without consulting the Lord Chief Justice of the Court of Common Pleas.

**LORD CHIEF JUSTICE COCKBURN :—**It is generally so, but there are exceptions.

**MR. SERJEANT SHEE :—**My lord knows exactly how that is, having filled the office of Chief Justice of the Court of Common Pleas. It is the Lord Chancellor's appointment, but I believe, that out of respect to the Lord Chief Justice, in whose court, twenty years ago, the Serjeants had exclusive audience, it is not generally given without his assent and approval. If Lord Campbell knew that there were objections to Mr. Seymour, of the nature which afterwards became public, I repeat, that if he did not before his death regret having made the appointment, he ought to have regretted it, and that he did, by making the appointment, a very serious injury to the profession.

Gentlemen, do I mean by this to represent that Mr. Seymour was not in point of practice, or in point of ability, a fit man to be appointed Queen's Counsel? Of late years the rank of Queen's Counsel has been given much more lavishly than it was when my lord and I were called to the bar. There were then only two or three Queen's Counsel in much practice—not more than five or six, usually occupying this front row; but of late years, the rank of Queen's Counsel has been given to almost any man who is of fair standing at the Bar, and whose character is unstained. If there be a stain upon it, it is never given; it had never been given in my memory, to any man with a stain upon his character, until it was given to Mr. Seymour. If I may be permitted to speak of the dis-



posal of the honours of the profession by the Lord Chancellor, the right course to have taken in the matter would have been, as was done on Mr. Seymour's application for the coif, to have postponed a decision upon it; to have given Mr. Seymour a reasonable time to bring his case before the proper tribunal; to have told him that there was no objection to making him a Queen's Counsel, except the unhappy rumours which had arisen out of his taking the benefit of the Gentleman's Act, and that as soon as all that prejudice was cleared away to the satisfaction of the Benchers of his Inn, he would receive the rank to which his professional position entitled him; and mind, his professional position did entitle him to it, regard being had to the way in which that honour has been, for the last twenty years, distributed among the members of the profession. This, gentlemen, is what I have to say upon the second question:—Is the minor patronage of the Crown as dispensed by the Home Secretary, and the higher patronage of the Crown as dispensed by the Lord Chancellor to the members of the Bar, honestly and properly bestowed, or given for considerations and for objects which ought not to influence those who have the disposal of them?

I now come, gentlemen, to the third and last point which it is my purpose to submit to you; one which, though differing considerably in its character and complexion from the other two, is nevertheless of the utmost interest to the Bar, and because of interest to the Bar, of interest to the public. The passage of the article to which I am about to address myself, relates to the conduct towards Mr. Seymour of a very important subdivision of the Bar of England—the Northern Circuit; and the question as I have written it (being most anxious to submit to you well-considered, definite propositions, which you may clearly understand, and which I may discuss without being too discursive,) is this:—Is it true that so large and considerable a portion of the privileged body admitted by the Inns of Court to the degree of Barrister, as the Northern Circuit, can have so disgraced itself with regard to a young man, without a dishonouring blot upon his character, as to make him the mark of a cruel and jealous opposition, and a determination to keep him down, merely because he was of Irish birth? Now, it may be that, properly and strictly speaking, this is not in its nature a public question, but it borders very closely upon the limit of public questions; it is a matter of great moment to the Bar, and it does indirectly connect itself with the other questions which I have discussed, because, if injustice has been done to Mr. Seymour, it has been done by 207 gentlemen of whom many are of high eminence at the bar, every one of whom is without any



right to practise on the Northern Circuit or elsewhere, except the right which he derives from the degree of barrister conferred upon him by his Inn of Court. If not in its intrinsic nature a public question, Mr. Seymour has made it a public question. Mr. Seymour has thrown it down for discussion before the electors and non-electors of Southampton; Mr. Seymour has made it the main point of his appeal to the populace of the borough which he represents from the censure pronounced upon him by the Benchers of his Inn; he protests in that appeal, that all his misfortunes have arisen from the mean, dastardly, unscrupulous conduct of a number of gentlemen of the highest position at the bar, the members of the Northern Circuit. How can Mr. Seymour complain, after having invited, provoked, necessitated the public discussion of such a question, that the gage thrown down by him was taken up, and his challenge met in the public press by as strong a corrective as it deserved? But let us see a little more in detail what it is Mr. Seymour complains of; it is the only matter in the whole of the libel to which he has appended an *innuendo* to the effect, "this means me." I do not want to protect myself, or rather my client, by merely verbal criticism upon an article of this description. In terms, the article does not say of Mr. Seymour that of which Mr. Seymour complains as being offensive to him. But though not in strict construction said of him, you may have to judge whether it was meant to apply to him; and if it was, whether he did not deserve it; and if he did not deserve it, whether he did not so nearly deserve it as to deprive him of all right to damages from the defendant. Mr. Seymour has the unhappy habit, when displeased with only a few members of his profession, of putting the whole Bar of England on its trial. I venture distinctly to say (and you know I would not say it, and could not say it, in the presence of this audience, if it were not true) that there never was a more slanderous or disgraceful charge than the charge made by Mr. Seymour against the gentlemen who are the members of the Northern Circuit. If it had been said of my own Circuit, the Home Circuit, I should have felt it as a wound,—and though not uttered of my own Circuit, but of the Northern Circuit, I still resent it as a dishonour and an insult to the whole profession. So far from having joined the Northern Circuit under a disadvantage, Mr. Seymour went to it with great advantages in his favour. Such Irishmen as Baron Martin, Mr. Justice Hill, Mr. Serjeant Murphy, Mr. Seymour Fitzgerald, then held distinguished place on it. It is all moonshine to pretend that the son of a clergyman of the Irish Branch of the Established Church, and a graduate of

Trinity College, Dublin, is received in England in any spirit but the spirit in which an Englishman is received. Received! why, gentlemen, he is made welcome—no man better liked than a worthy member of the nation and the class to which Mr. Seymour by his birth belongs. Mr. Butterworth asks you to judge if any man ought to have said what Mr. Seymour said under the circumstances in which he said it—that is, not to use his own unhappy phrase, “after dinner,” not heated by wine, but in a deliberate vindication of himself before the electors and non-electors of Southampton, or rather before the whole world, wherever the *Times* newspaper is read. It is for you to determine whether what Mr. Seymour admits that he said, does not justify a degree of indignation in the minds of all who saw it the next morning in the columns of that journal, such as to account for, if not to justify, the intemperate language which is used in this article respecting him:—

“Gentlemen,” said Mr. Seymour, “I have now been nearly sixteen years at the Bar. I never won a laurel and never obtained a promotion without a severe and arduous struggle. I came among the members of the Northern Circuit with that misfortune which my countryman Grattan has described, I came ‘with the curse of Swift upon me,’ I was an Irishman. I was made from my earliest time the mark of a cruel and jealous opposition, and a determined effort to keep me down if it were possible. But, gentlemen, their efforts failed.”

Such is the charge which Mr. Seymour made against the Northern Circuit, a Circuit at least equal in number, in the honour, learning, and high character of its members, to any Circuit of the United Kingdom. I say that that charge is one which imputes the most scandalous dishonour to a body of honourable and respectable gentlemen, and it is utterly and entirely groundless. If it were possible that so illiberal a feeling as Mr. Seymour imputes to the Northern Circuit could influence any considerable portion of our profession, it could hardly fail to have become known to the humble individual who now addresses you. As a member of an Irish family, bearing an Irish name, paternally of Irish descent, generally supposed to be of Irish birth, and having taken during the five years I sat in Parliament for an Irish county more interest in the affairs of Ireland than probably any man in the House of Commons not connected with the Government,—if the mere fact of being an Irishman could make a man “the mark of a jealous and cruel opposition,” I most certainly should have found it out. I assure you, gentlemen, that I have found nothing of the kind. I see my brother O’Brien on my right hand, an Irishman of the Midland Circuit,

than whom no man is more liked, or more respected. On my left I see another friend, Mr. O'Malley, of the Norfolk Circuit, than whom no one fills a better position at the English bar. We have, on the Home Circuit, Irishmen to whom I will refer but sparingly, lest I should wound their modesty. One of them lately appointed, as he deserved to be, by my lord, to the office of Master of this Court, was, while he remained with us, the delight of our social meetings ; another, whom I know to be now in Ireland, I will take leave to name, because he is the most Irish of Irishmen, of an ancient and honourable Irish family, rendered illustrious in our own day by the great political distinction of his uncle—Morgan John O'Connell. No man stands better on our Circuit, there is perhaps no one so general a favourite as he is. I say that the statement made in haste, possibly, and excitement, by Mr. Seymour at Southampton, was untrue, and was one that he must have known, had he given himself time to think, to be, without the qualification he gave it yesterday, untrue. Whether true with that qualification I know not ; but as he proposed it for public criticism, it was altogether and inexcusably untrue. Nay, it was worse than untrue ; the fact is,—and it is creditable to the gentlemen of Irish birth and Irish descent at the English bar, and creditable also to the good feeling of the people of this country,—that, whereas Irishmen cannot have, when called to the bar of England, the advantages in respect of connexion, the connexion of fathers and brothers, and brothers-in-law and uncles, and step-fathers and cousins, among solicitors and persons of local influence, to push them into business, which Englishmen have, they get on notwithstanding, aye, and get well on, occupying some of the best places at the Bar, and being received and treated not only by members of the Bar, but by the Judges on the Bench, with as much kindness, courtesy and friendship as the purest-born Englishman that ever put a wig upon his head. Wherefore, I say, it is a scandalous and disgraceful imputation upon a body of gentlemen with whom Mr. Seymour had a right to struggle in fair and honourable competition, but against whom he had no right to make so damaging, so discrediting, so dishonouring a charge, as that they had, from the earliest period of his connexion with them, pursued and persecuted him because he was an Irishman. He knew it was not true : he as much as owned it to me yesterday, regretting fairly enough the generality of his language, and confining the charge, upon his oath, to a very few members of his Circuit, and to the latter part only of his career. Unhappily, however, before the article he complains of was written, he had published, without the qualification he now desires to give it, to the whole world, to be circulated wherever the English

language is understood, and our national and commercial affairs are subjects of interest, this libel against the members of the Northern Circuit, to be read by the family connexions and acquaintances of that numerous and respectable body, all of whom were to be disgraced and shamed by it, because it pleased Mr. Seymour to appeal from the Benchers of his Inn, not to the fifteen Judges before whom he would have said exactly what he meant and no more, but to the electors and non-electors of Southampton.

Now then, gentlemen, let us come to the passage of which Mr. Seymour mainly and principally complains. In my humble judgment, if the language used in that passage had been more guarded it would have been more effective. I cannot pretend to say that I like that language; and I will further say that in Ireland, at least, it is very rare if it be possible, (and I know something about it, having gone through three contested elections for the County of Kilkenny,) to meet the sort of animal that is described in the latter part of the passage which I will now read:—

“But it is only just to Mr. Digby Seymour to admit that there are two kinds of Irishmen, and that the cordiality extended to the one is by no means secure to the other. There is the Irish gentleman, generous, accomplished, and urbane, perhaps the highest type of the genus gentleman to be found in the United Kingdom.”

Well, that is very high praise indeed; and those who know what Irish gentlemen are in their own Irish homes, would probably be inclined to agree with the writer that they deserve that character, though I cannot say, and do not think, they deserve it better than the real gentlemen of Scotland or of England.

“There is also the Irish blackguard, swaggering, foul-mouthed, and shameless, the most insolent of upstarts, the most unblushing of swindlers, never destitute of a quarrel, never at a loss for a lie. For as the Irish gentleman is of rare quality, so the Irish blackguard is consummate in his growth. Ireland is always great in extremes, more especially in her psychological productions. She has reared generals who have led their armies to certain victory, and she has reared also the tribe of cabbage-garden heroes. She has adorned our Parliament with splendid orators and consummate statesmen,”—my friend rather criticises Irish eloquence; our time would, I must say, be better spent in an endeavour to imitate it—“and has afflicted it also with a breed of bawling demagogues and venal fools. And so it happens that this green and prolific island, with the singular versatility of her race, has supplied to the bar of England some of its brightest ornaments, and some of its blackest sheep; bestowing on the former

a learning and eloquence which Englishmen are proud to admire, and enriching the latter with a power of impudence and a fertility in fraud which defy all description, as (to the uninitiated intellect) they pass all knowledge. Should one of this latter flock find his way to an English Circuit it could hardly be considered a matter for legitimate surprise, if he should become an object of suspicion and dislike, and '*hic niger est*' be the motto coupled with his name."

Gentlemen, I am not about to shelter myself, or the defendant, under a mere critical discussion of the precise language used in this passage which does not in terms apply to Mr. Seymour. He submits to you, by an *innuendo*, and through his counsel, that it was meant to apply to him. Let us consider what the circumstances were under which it was written, and what the nature of the charge is. Now mind, there is not a single word in that long passage, or barely a word, which, if uttered *vivâ voce* (unless indeed it be the word "swindler"), could be made the subject of an action. It is mere abuse ; it imputes no personal misconduct, fraud, or dishonesty in any particularly specified transaction with any individual. It is strong language, no doubt, but the fair construction of it as a whole is this : "No man on the Northern Circuit can have been treated by it as you say you were treated, because you were an Irishman, unless he was an Irishman of a bad and exceptional character." That is the fair meaning of it. I do not admire the language ; I do not pretend to do so. It will be for you, in the first place, to say whether the meaning I have given to it be not its fair and true meaning ; and secondly, whether, if the offensive words used in it are meant to apply to Mr. Seymour, he has not brought upon himself the severe castigation which they inflict. There is nothing said here of Mr. Seymour worse than he said of the great body of the Northern Circuit, or much worse than he said of the Benchers of his Inn when he charged them with having made every presumption against him in a case which affected his means of living, his reputation, and his honour. I say he has to thank himself for any pain which this passage in the article has caused him. It was he who made the whole thing public. He forced a matter before the public which the Benchers of the Middle Temple thought themselves justified (and I had rather not express any opinion on their conduct in that respect) in confining to their parliament chamber. He forced it before the public in the loud, insolent, offensive, and unjust statement which was made by him at Southampton against those gentlemen, and against the members of his Circuit. Again, shortly afterwards, in the letter which was read to you, in which he said that he

had not been dismissed from the Northern Circuit, (he having only been dismissed from the Northern Circuit Bar Mess,) he provoked, I say, strong and earnest language in reprobation of his conduct. He now comes here to ask you, through my learned friend, to give him damages. Gentlemen, I will tell you what he hopes from your verdict; and as you value the best interests of society, the honour of the Bar, the honour of the Queen's Government, and the character and independence of Parliament, I beg you to have a care how you give it to him; he comes here to complain of a libel which he knew it would be impossible for Mr. Butterworth to justify, in order to get from you, if he can, by a side wind, what may be mistaken by ill-informed persons for a reversal of the censure which was passed upon him by the Benchers of his Inn. He thinks that if you, through the exertions of my learned friend, can be induced to give him more than nominal damages, the world generally will believe that the only serious libel in this article (the judgment of the Benchers of his Inn) was a judgment which you considered to have been prompted by malice, and the act of men unduly influenced to his prejudice by a feeling of unworthy jealousy. That is what he hopes; he well knows that people generally do not look too closely into the reasons on which the verdict of a jury is founded, and that if you were to award him any considerable damages, it would be thought that you had given a verdict against the Benchers of the Middle Temple. They may possibly be open to animadversion for their lenity; they may be justly blamed for that, entertaining the opinion they had pronounced of Mr. Seymour's conduct, they resolved, until he forced them into a different course, to screen him, and not their judgment on him. They may deserve some censure for having so acted, but to give Mr. Seymour a substantial verdict, would be to decide what you have no means of judging of, that Mr. Seymour is an injured man; that he has been wronged, as my friend says, by his Circuit, and by the Benchers of his Inn, and that he deserves to stand on a par with the most honourable and respectable of his profession.

Gentlemen, I hope to see the day when Mr. Seymour will take his fair rank, not merely in name, but in reality, among us; when we shall be glad to welcome him as our equal and our friend; but until he clears himself effectually, and in the proper course, from the charges in respect of which the Benchers of the Middle Temple have, while adjudging them not to have been proved, thought right to admonish him, that never can take place. I now leave the case in your hands, in the confident belief that you will give a verdict

for the defendant; or, at all events, such a verdict as will prove to Mr. Seymour that if he hopes to vindicate his character, he must set about it in the right way.

#### SUMMING UP OF LORD CHIEF JUSTICE COCKBURN.

Gentlemen of the Jury,—In entering upon the judicial consideration of this case, on your part and on mine, some difficulty arises from the way in which it is presented to us to deal with; inasmuch as the whole of this article, from the beginning to the end, is set forth in the Declaration as libellous matter complained of by the plaintiff; and, inasmuch as the article embraces various parts of Mr. Seymour's conduct, both public and private, and is at the same time accompanied with various reflections, political, professional, and personal, it is rather difficult, at the first onset, so to analyse the case in one's own mind as to deal, as one must do, separately and distinctly with each of these heads. I will do my best to assist you by dividing the whole of the article into the various heads of complaint which appear to have been referred to in the course of the discussion. The article professes to deal with the political, professional, and personal conduct of Mr. Digby Seymour. In dealing with each of these various heads, many observations are made of a general character; and it is difficult to say, as one goes through them, to what extent these observations are intended to apply immediately to the gentleman who brings this action. We must do our best, however, to distinguish carefully the various heads of charge, and to see how far they contain libellous matter, and how far they really reflect on the character and conduct of the plaintiff in the cause.

Now, gentlemen, I think the whole may be reduced sufficiently for the present purpose to three main heads: the conduct of Mr. Digby Seymour in obtaining the Recordship of Newcastle-upon-Tyne; the conduct of Mr. Digby Seymour in obtaining his promotion to the rank of Queen's Counsel; and, lastly, his private conduct in respect to certain pecuniary transactions which formed the subject-matter of the inquiry which took place before the Benchers of the Middle Temple. It is not disputed by the learned counsel for the plaintiff that, as regards a man's public political conduct, that is matter for the freest and fullest discussion on the part of a writer in a public journal; but with regard to those things which relate to the private conduct of Mr. Seymour, Mr. Lush (his Counsel) takes a distinction. He says, you have a right to discuss, with the fullest



freedom and latitude, the public conduct of a public man ; but you have no right to pry into the transactions of his private life and conduct, and make them the subject-matter of public obloquy and public criticism. With regard to that last proposition, I shall think it necessary to address a few observations to you when I come to that part of the inquiry which relates to these charges of pecuniary delinquency. With regard to the first portion of the case, we are not embarrassed by any such distinction. It is admitted that the public conduct of a public man, political or professional, is a fair subject for discussion, a fair subject for hostile criticism, and a fair subject for hostile animadversion, provided that the language of the writer is kept within the limits of an honest intention to discharge a public duty, and that his observations are not made the vehicle or the instrument of slander and of malice, using criticism not as a means of fair discussion, but of slanderous and malicious accusation.

Now, what is it that this article alleges with regard to Mr. Digby Seymour as connected with his acceptance of or obtaining the Recordership of Newcastle-upon-Tyne? The article begins with general observations, as to which it is impossible, I think, to say that they do not come fairly within the scope and province of a public writer. Whether it is desirable that members of the Bar, being in the House of Commons, shall receive appointments to subordinate offices held by members of that profession while they are in Parliament, as the reward of their parliamentary adhesion to one or the other of the great political sections of the State, is a matter which nobody, for a single instant, would deny to be a perfectly fair subject for public discussion. On the one hand, it is said if a man is otherwise entitled, by his professional standing, by his attainments and his character, to an appointment to a professional office which happens to fall vacant, why should he be excluded because he is a member of the House of Commons? Nay, the argument goes further ;—it is said, why should not the influence which he fairly acquires with the Government of which he is an adherent and a supporter, be fairly used by him in order to obtain the promotion to which, perhaps, he would not attain were it not for that circumstance, but for which, nevertheless, if he is fortunate enough to obtain the object of his desire, he is perfectly qualified. Well ; that is a very fair argument on the one side of the question. On the other side it may be said, that although there is no objection to a man who is a member of Parliament taking office if he takes it with all the responsibilities of office and in the face of the public ; that although there is no objection to promotion when that promotion takes a man out of his



sphere in the House of Commons, by promoting him to a judicial office inconsistent with his being a representative of the people ; there is an objection, and a well-founded objection, to men who ought to be, according to the theory of the constitution (whatever may be its practice), free and independent members of the Legislature as representatives of the people, accepting office while in Parliament and putting themselves under a sense of favour and obligation which binds them, as it were, to a particular course of conduct. All these are perfectly fair matters for discussion ; and I entirely agree, and I think you also will agree, with the learned counsel who addressed you on the part of the defendant, that it is not only within the province of a public writer to discuss such subjects, but that he is fully and fairly entitled, if his opinion be that such a course of proceeding is detrimental to the independence of the Bar, to the independence of Parliament, to the due representation of the people and to the Government as the Government ought to be carried on, to animadvert with severity on the conduct of those who give, on the one hand, and those who receive, upon the other.

Now, if the article in question confines itself within those limits ; if it discusses the propriety of giving or receiving patronage under such circumstances ; if having established, as the writer thinks, the impropriety of such a system, it proceeds to animadvert upon those who have lent themselves to it on the one side or on the other, I apprehend no one would doubt that that is within the legitimate province of a public writer. But if the writer goes beyond that, and asserts that a Member of Parliament, being a member of the Bar, has bargained to sell his vote upon a corrupt contract, and asserts that whereas the member would not, under other circumstances, have voted in a particular way, that he has either spoken or voted, or both, in support of a particular measure or against that particular measure, under a corrupt understanding that his adherence was to be purchased by a corrupt vote,—that I apprehend no one would hesitate to say is a most serious charge ; a charge that no man, whether writing in private or in public, ought to dare to make against another, unless he is prepared to prove and to substantiate an imputation of so gross and serious a character. I know there are some persons who entertain very shadowy notions about public morality, and the honour and integrity of public and political character. I trust that such opinions will never find their way into the jury-box, when a man who has had a charge of that kind made against him comes forward to vindicate his character in a Court of Justice. I trust, for the honour of the country to which

we belong, that there is such a thing as political honour and political integrity ; and I trust that a matter of such serious importance to the well-being of us all, will never be treated lightly or contemptuously in a Court of Justice ; and that if a charge is made against a man of having sold himself and his vote on a corrupt bargain for promotion to an office, or to any other object of ambition or desire, unless the charge can be substantiated it will not be treated lightly by a jury. But then, gentlemen, it is for you to say whether, upon reading this article, it amounts to more than this ; that here is a vicious and bad system existing in the government of the country, carried on by whichever section of the great factions or parties of the State it may be, which is unhappily prevalent, of rewarding political adherents by the distribution of patronage and by appointments to offices, which appointments would not otherwise be given to the parties on whom they are conferred. If all that the article means is, that that system, being unhappily prevalent, has led, in the present instance, to the appointment to an office and to the promotion to high professional rank of a gentleman who had no just claim to either, and if that question is fairly discussed, it is not because Mr. Digby Seymour, or anybody else against whom such animadversions may be directed, may smart under them, that, therefore, the jury are to say that the article is libellous. All men who occupy public positions must submit, now and then, to be a little roughly handled, and to be uncourteously, and often unjustly, treated ; and people must not be too thin-skinned with reference to such matters. It has happened to everybody who has had anything to do with public life, to have, at one time or other, observations made upon his conduct and motives which, in all probability, at the bottom of his heart he has felt to be unfounded and unjust ; but we submit to it, and why ? because we know that, upon the whole, that bringing, by means of the public press, the conduct and motives of public men to the bar of public opinion, is the best security for the discharge of public duty.

And now let me call your attention, gentlemen, to what this article is ; and then it will be for you to say whether you think that it is only with a view of denouncing a vicious practice which has obtained in the case of Mr. Digby Seymour, that these observations are made ; or is it intended to impute to Mr. Digby Seymour that he has bartered his vote and his parliamentary independence for the sake of obtaining the office of Recorder of Newcastle, in the one instance, and promotion to the rank of Queen's Counsel, in the other ? They say in the article,—

“ We never were able to discover that Mr. Digby Seymour, during

his first sojourn in the House of Commons, added in any appreciable degree either to the usefulness or the brilliance of that assembly ; we are not aware that any measure was secured by his exertions, or any principle elucidated by his oratory, or any party at all benefited by his adherence, save in the matter of his vote."

That is a sort of observation that no man can complain of ; anybody may entertain that opinion. In another place they deny his scholarship and his genius. All those are things for which a man must not bring an action for libel. A political adversary, when he is writing adversely, always doubts the motives or denies the ability and genius of the man against whom he is writing. We do not attach any importance to those things. If, for instance, a man sitting down and discussing the merits of various members of the profession, were to say of my brother Shee that he is not a man of genius or of eloquence, we should only laugh at him for saying so, because the contrary is notorious to everybody who knows or has ever had the advantage of hearing him. Nobody would think of bringing an action for such a thing as that. A man's scholarship, his title to be considered a genius, an eloquent man, or a valuable member of society, are all matters which are open to observation ; and no man can complain if people do not take so favourable a view of his merits and claims to distinction as he does himself, or as his friends may do for him. But then, after all that, there comes the important matter. They say,—

"For this last" (that is, the matter of his vote) "he was rewarded with the Recordship of Newcastle, to the just dissatisfaction of the Bar, who thought that better men had been passed over for an unworthy political motive."

I do not know that that, again, as regards the Bar, and the opinion that better men had been passed over from political motives, is not a perfectly legitimate observation. Mr. Seymour was a man of eight years' standing ; fit for the office probably ; but I do not think that Mr. Seymour himself, or his learned advocate on his behalf, would think of saying that the Northern Circuit, comprehending, as it does, so large a portion of the ability and attainments of the Bar, and where there must have been men of so much longer and higher standing than himself, did not contain a number of men to whom that office would have been given in preference to Mr. Seymour, supposing that professional claims to advancement had alone been taken into account. That does not conclude the question, whether a man in Parliament, who is a supporter of the Government, may not be entitled to the preference—that is a matter of opinion ; but it cannot be any hardship upon Mr. Seymour to say that in the profession, the

great majority of whom are not in Parliament, there would naturally be some dissatisfaction at finding a man so much their junior in years and in standing promoted to an office which would be, in all probability, an object of ambition and desire to a number of gentlemen on his own Circuit of higher standing and (to say the least) of not inferior ability to himself. They say,—

“For this last he was rewarded with the Recordship of Newcastle.”

Then to that there is appended this note,—

“We observe that in his speech at Southampton, Mr. Digby Seymour instances his elevation to the Recordship of Newcastle as a proof of his *professional* success. We believe that Sir George Hayter could, if he were so minded, tell a different tale.”

Now, gentlemen, I think it is but fair to call your attention to that paragraph, and ask you to consider (for it is with you) what is meant by it? If you see your way to the conclusion that it is meant to intimate that there was some corrupt contract between the Government and Mr. Digby Seymour, that if Mr. Digby Seymour would give his vote in favour of the Government on any particular question, or generally, he should be rewarded by obtaining this office, then there is no doubt that that is a very serious imputation upon him.

Then, gentlemen, besides that, there is another passage to which I must also call your attention, with reference to this important question of the Recordship; but let me first take you to that part of the article which relates to Mr. Seymour's promotion to the rank of Queen's Counsel. They say:—

“The worst evil attending a weak government is the necessity under which it labours to catch every possible vote in any quarter, and its besetting sin is an improper distribution of patronage; Lord Palmerston's present administration has probably never numbered a working majority of twenty trustworthy votes in the House of Commons, and the political circumstances of the time have tended to diminish the ranks of ministerial supporters.”

Those are general observations about which nobody, I suppose, could raise a serious question as to their not being such as might be very properly made by a man who was discussing the subject of public patronage.

“It probably became necessary to secure every doubtful adherent, and this consideration may palliate, but cannot excuse the promotion of Mr. Digby Seymour to the rank of Queen's Counsel. Even at the time of the appointment, rumours were afloat in the pro-

fession that his conduct must form the subject of investigation by the Benchers of the Middle Temple, and we have heard that Lord Campbell, shortly before his death, expressed his deep regret that he had been ever led by political pressure to promise a silk gown to the member for Southampton."

Now there, again, I ask you what does that mean? Does it mean that Mr. Digby Seymour obtained his rank as Queen's Counsel by virtue of any corrupt understanding with the Government; or does it merely mean this?—that it is rather an attack upon the Government than upon Mr. Digby Seymour. You see Mr. Digby Seymour, in his speech to the electors of Southampton, cited and referred to his appointment by Lord Campbell as Queen's Counsel as one of the circumstances in his favour; and it has been used in the course of the discussion here as a certificate of character against the charges which had been brought against him before the Benchers of the Middle Temple, and against the censure which the Benchers thought fit to pass upon him. Upon that, the writer of this article makes these observations. He says:—

"If this be so, it furnishes a curious commentary on one portion of Mr. Seymour's speech at Southampton, in which he quotes the patronage of Lord Campbell as a proof of the purity of his professional career."

Now, if what that meant was, "Instead of your citing that as a proof that Lord Campbell considered you a man of unexceptionable character and one upon whom the rank of Queen's Counsel might well be conferred (and you put it forward in that shape to the electors of Southampton) we say the fact is this; that such is the position of Government, from its weakness in the House of Commons, that it is under the necessity of securing every political adherent that it can; and hence it is under the necessity of distributing professional patronage in a manner in which probably it would not otherwise be distributed." If that be all that is meant, you would probably say there is nothing libellous in a public writer, when he is discussing the propriety of such a system of distributing patronage, indulging in such observations. But is that all that is meant to be conveyed, or is it intended to imply that Mr. Seymour has corruptly bargained and sold his parliamentary votes and his independence, to the Government, in order to obtain professional promotion? Then the article goes on to say:—

"It is an extraordinary, and we believe, an unprecedented fact, that a Barrister should be arraigned before the Benchers of his Inn for

improper conduct at the very time when the Crown has been induced to raise him to the superior rank of the profession. Yet this, we understand from his own lips, was the case with Mr. Digby Seymour ; and the language employed by the Benchers in their judgment forbids us to hope that the inquiry before them was either unjust or uncalled for."

Now, if what was meant by that was simply this : " You have been promoted, not because the Lord Chancellor thought that your professional attainments were such as entitled you to it, but because your promotion was part of the system by which the Government secures adherents ; and, in addition to that observation, we must say this, that you were promoted by the Lord Chancellor at a time when there were charges, and grave charges, brought forward against you, and therefore the promotion was one which the Lord Chancellor was not justified in making," it becomes a question, as I have said before, whether that is not fairly within the scope of public discussion with reference to a matter of so much general interest and importance ; and if the case had stopped there, I do not, myself, think, I must own, that up to that moment in the discussion of this question of the promotion of Mr. Seymour as Queen's Counsel, anything is said which might not have been said on the promotion of any other gentleman who happened to be a Member of Parliament, and who happened to be promoted to the rank of Queen's Counsel, he being at that time a member of the House of Commons, and an adherent of the Government, subject to this, that there is an allusion to the proceedings which were then pending against Mr. Seymour ; but upon that, again, I must observe, that if a gentleman happened to have the misfortune to have grave charges, affecting his character as a gentleman and man of honour, pending before the Benchers of the Inn to which he belonged, (the proper tribunal on a question of professional discipline,) and if that were known to the Lord Chancellor, it would not be consistent with the duty of so eminent an individual as the Lord Chancellor to promote a gentleman while those charges were pending against him. But, gentlemen, these observations do not stop there. After setting forth Mr. Digby Seymour's speech to the electors at Southampton (which on every ground I cannot help thinking was a most unfortunate one, and upon which I shall have something to say presently) they say this :—

" If this speech took the public by surprise, it was read by the Bar and the Benchers, though on different grounds, with considerable astonishment. The Bar were amused to find that the promotion of Mr. Digby Seymour, first to the Recordship of Newcastle and then to the rank of Queen's Counsel, could be quoted as

any approval of his professional character, when the favour shown him was notorious by the result of negotiations in the division lobby."

Now, what was that intended to convey? Was it intended simply to say that Mr. Digby Seymour had given his adhesion to the Government in the hope of obtaining professional advancement and promotion, and that he succeeded in that object; or that the Government, in the hope of securing a gentleman of Mr. Seymour's attainments and position as the representative of a large commercial borough like the town of Sunderland, had given him office in the one instance and promotion in the other, which they would not have given if he had not been a Member of Parliament; or does it mean to say this: "You (Mr. Seymour) were at the best a doubtful adherent of the Government; you were very likely to go against them, and would probably have gone against them on some occasion when your support was of importance; negotiations took place in the lobby of the House of Commons, and by means of those negotiations, and by reason of your agreeing to support the Government, you got a promise, which was afterwards realized, of the Recorder-ship of Newcastle in the one case, and of the rank of Queen's Counsel in the other." If that is what is meant, I own I cannot help thinking (and you will probably think) it is a very serious charge to make against any one. Although a man may fairly say, "While I support the Government, if I, *cæteris paribus*, am as good as another man that gives me a title to a preference;" and there are many honourable men who think that not inconsistent with political integrity and honour, there are others who think it is fatal to the independence of Members of Parliament and to the best interests of the public. That is a matter on which there are grave differences of opinion; but to say that a man entertains an opinion on a particular subject which would induce him to speak or vote against the Government of the day, and that then those who deal with and manage the delicate subject of winning members to vote one way rather than the other, enter into negotiations with him in the lobby and, he being a man of plastic political morality, secure his adhesion by promising this or that, or by holding out little inducements of this or that kind, and get him to vote in a way in which he would not vote otherwise, that appears to me (though it is a subject for you to exercise your judgment upon and not for me, except so far as I can help you by pointing out what are the considerations which arise) to be a matter involving a grave charge of political dishonour and dishonesty. If the meaning of the observation is, that Mr. Seymour



corruptly sold himself to the Government; you ought, certainly, to treat it as libellous matter, and as a thing beyond the province of a journalist or a public writer to assert, unless he is prepared to prove it. Mr. Digby Seymour has been examined with reference to these matters, he was cross-examined especially respecting his appointment to the Recordship; the office was offered, in the first place, to Mr. Atherton, a gentleman of very high distinction on the Circuit; in fact, one of the leaders of it, and now her Majesty's Attorney-General. Mr. Atherton did not think it worth his while, in his position, to accept it; he did not think it worth the trouble of a contested election which it would have involved, and therefore he declined it. Then, it is certainly rather a significant fact that one of the gentlemen discharging the duties of a whipper-in, should have been speaking in the lobby to Mr. Seymour on the subject of the Recordship, and saying, that if Mr. Atherton refused it, he (Mr. Seymour) probably would have it. On the other hand, if the language used in this article bears the character and complexion to which I have referred; if it means to assert that there was a corrupt bargain on the part of Mr. Seymour, there is, in the first place, no attempt to put a justification on the record, as has been pointed out to you by the learned counsel for the plaintiff; and, in the second place, it is for you to say whether or not an observation of that kind made by a gentleman in the position of Mr. Berkeley was anything more than an observation made by a member of the Government, who having probably been informed that Mr. Seymour was an applicant for the Recordship of Newcastle, said in a friendly way, and as a pleasing piece of information, that a gentleman to whom the appointment had been offered had refused it, and that therefore there was reasonable ground for expecting that Mr. Seymour might obtain it.

With these observations I will leave that part of the libel, as to which it is admitted that a public writer may fairly enter upon the discussion of subjects of this kind, as being of a public nature affecting the character of a public man. Are you of opinion that the writer has kept within the true bounds and limits of his right and duty as a public writer, or is an assertion here made, reflecting on the character and honour of Mr. Seymour, which is without foundation? If so, Mr. Seymour would be entitled to your verdict for whatever you may think reasonable in respect of that charge.

But I entirely agree with my learned brother, that that is not the important and prominent part of this question; and I cannot help thinking, that however much may have been made of it, if that had been all, we should not have heard of this action, and that the really

stinging part of this article is that portion of it which relates to the charges which were made the subject of inquiry, and afterwards the subject of animadversion before and by the Benchers of the Middle Temple.

Now, it becomes very important to see how the case is put in the article; whether new facts are stated, or whether the writer proceeds upon the facts as stated by the Benchers in their judgment. Before entering, however, upon that part of the inquiry, I must here observe upon what fell from Mr. Lush as to the legal position of the parties with reference to this part of the case; namely, that although the conduct of a public man is open to public discussion, his private conduct is not; and that it does not lie in the mouth of a man who has attacked another with reference to his private conduct to say, "I did it only in the fair discharge of a public duty." But there is this distinction in this case, that however true that proposition may be with reference to the private conduct of a private individual, Mr. Digby Seymour does not occupy the position of a private individual, nor is it as a private individual that these charges were made the subject of inquiry before the Benchers of his Inn. Mr. Digby Seymour is a barrister, and as such is subject to the jurisdiction of the domestic forum of the Benchers of his Inn; and I take it to be beyond dispute, that if the conduct of a member of an Inn of Court is such as to be unworthy of a gentleman and a member of the profession, he is within the jurisdiction of that forum. We hear of charges in the army of conduct unbecoming an officer and a gentleman, and although there may be no breach of military discipline, yet the breach of individual honour is held to be a sufficient ground for inquiry, and for such animadversion as the case may call for. In like manner, if the conduct of a member of the Bar is such as to be unworthy of a barrister, and unworthy of a gentleman, that again is always considered to be a proper matter to be inquired into by the Benchers of an Inn of Court. Upon that ground it was, and upon no other, that these matters were made the subject of inquiry. Now, why is it that the Benchers of an Inn of Court have this jurisdiction? Partly for the protection of the profession, and partly for the protection of the public; that the profession may not be disgraced by having enrolled among its members persons who are a dishonour and a discredit to it, and partly that the public, who consider (as you have been truly told) the rank of a barrister a sufficient test of the trustworthiness and honour of an individual, may not be misled and deluded by such a belief, if his conduct be really such as to disentitle him to their confidence; and therefore I

cannot help thinking, that if the conduct of a barrister is brought under the notice of the Inn of Court to which he belongs, and they think it necessary to pass a public censure upon him, in respect of conduct which they consider discreditable and wrong, that is a public matter which may very fairly be inquired into and discussed as a subject of public interest, because the professional conduct of an individual member of the Bar is a matter of public concern, inasmuch as it is in that professional character that he is brought into contact with the public, and trusted by those who have their own interests to defend or to protect, and who employ him for that purpose. But that is not the only matter in this part of the case which deserves attention. Mr. Digby Seymour was not only a member of the Bar; he was not only a member of the Bar who had been (I think during these proceedings) promoted to the rank of Queen's Counsel, but he was also one of the Judges of the land. He was a Recorder, having not only civil but criminal jurisdiction; trying men for offences against the law, and deciding questions of private interest and property, which came under his cognizance as a civil judge. He was subject to removal if his conduct was such as to render him unworthy of his office; at least that, which is an open question which has lately been raised, might be the subject of discussion. Under these circumstances it appears to me impossible to say that he was not a public man, and that his conduct, if it had reference to his fitness to be a public man, and to occupy a public position, was not a matter fit for discussion. Let me suppose that a judge who is to enforce the law by administering it, violated it, and committed some act against the law; or let me suppose that in the course of some trial it appeared that the judge had himself been wanting in integrity and honesty, would it not be competent to a public writer to discuss that conduct with reference to the propriety and fitness of the individual to hold the office which he might happen to occupy? It seems to me to be impossible to answer those questions in the negative, and I therefore must dissent from the proposition, that where a man holds a public position in which integrity, honesty, and honour are essential and indispensable qualifications, if, in his private conduct, he shows that he is destitute and devoid of those essential qualities, that is not a fair subject for public animadversion and hostile criticism, so long as the writer confines himself within the bounds of truth, and within the limits of fair and just observation. I cannot, therefore, go along with the learned counsel for the plaintiff, in saying that the matters which were discussed, inquired into, and disposed of by the Benchers of the Middle Temple were not matters which, looking to the position

of Mr. Digby Seymour, whether as a member of the Bar, as a man in public political life, or as a man occupying a judicial position, might fairly be made the subject of discussion. But then the question is, whether the comments which have been made have been kept within those bounds by which they must reasonably be confined. What is it that this article alleges? It states, so far as I understand it, no facts as regards the proceedings before the Benchers, but it sets those proceedings out, and makes certain comments upon them. It begins, by way of introduction to the proceedings before the Benchers, with this language:—

“It is an extraordinary and, we believe, an unprecedented fact, that a barrister should be arraigned before the Benchers of his Inn for improper conduct at the very time when the Crown has been induced to raise him to the superior rank of the profession. Yet this, we understand from his own lips, was the case with Mr. Digby Seymour; and the language employed by the Benchers in their judgment, forbids us to hope that the inquiry before them was either unjust or uncalled for. We are precluded, in common with the rest of the public, from ascertaining the exact nature of the evidence adduced against Mr. Seymour; and we conceive that the Bench of the Middle Temple have acted unfairly towards the Bar, as well as unwisely as respects themselves, in withholding a full report of the accusation and the proceedings thereon. That any injustice, however, can have been done by this silence to the accused, we can hardly bring ourselves to believe; for inasmuch as Mr. Digby Seymour is in possession of the whole evidence, and could give us the benefit of a total disclosure of all the circumstances of his trial, thereby putting himself right with the public, if the facts admit of his doing so; and as, notwithstanding occasional promises of such a disclosure, he remains silent, the only reasonable conclusion at which we can arrive is, that he does not consider the publication of the whole truth as likely to improve his position. All we can do under these circumstances is to place before our readers, at one view, the various documents that have been made public on the matter, and to collect, as far as possible, the scattered gleams of light that have fallen from time to time on the dark shadows of this remarkable case. We will only premise in doing so, that whatever publicity the scandal may now have attained, is owing to Mr. Digby Seymour himself, as the Benchers had maintained an absolute silence up to the time when his speech to his constituents, on the 4th of February last, was reported in the *Times* newspaper.”

Then passing over the speech, there is set forth the judgment of the Benchers of the Middle Temple. Now it is quite impossible not to feel that that judgment casts a very severe censure on Mr. Digby Seymour; but I think this observation must be coupled with it, that

nothing is added to the facts which the judgment of the Benchers sets forth. The writer of this article does not profess to add any facts with reference to these particular matters which were the subject of inquiry, but sets out the judgment of the Benchers in the exact terms of it; and if Mr. Digby Seymour had, for the first time, seen this judgment in print in this magazine, if—the sentence having been read to him in the parliament chamber of the Middle Temple, in the absence of every one except the members of his Inn—the writer of this article had, by some means or other, got it, and had given forth to the world that which the Benchers, out of consideration for Mr. Seymour, had not intended to be published, Mr. Seymour might have had a fair ground to say, “You have done me a serious injury, by publishing a sentence, which, though it condemns me in terms of severity, was never intended, by those who passed it, to be made public to the world.” That, however, is not the position in which things stand. Unfortunately, Mr. Digby Seymour went down to his constituents at Southampton, and there found that, somehow or other, what had passed in the parliament chamber had oozed out. The writer of this article is not responsible for that. Mr. Digby Seymour’s political enemies at Southampton made (to use a hackneyed expression) “capital” of this judgment which had been passed upon him; and when he got to Southampton, he found placards stuck about, suggesting questions to be put to him, as to what had passed in the parliament chamber of the Middle Temple; and the result is, that Mr. Digby Seymour, acting under the impulse of the moment, (I do not desire to animadvert upon it to his disadvantage,) gives publicity to the whole thing himself. He makes a long and violent speech; he comes back to London; he writes a letter to the *Times*; he writes a protest to the Benchers, and sends the whole matter for publication. The writers of this article, therefore, cannot be complained of as having been the first to give publicity to the charges which had been made against Mr. Seymour, and to the censure which had been passed upon him by the Benchers; but they do this—they give those charges, they give the sentence, and then comment upon them, certainly, in severe terms; but it is for you to say whether the severity of the comment is not borne out by the severity of the censure. But they do more; they insert all the documents which have appeared, so that their readers may judge for themselves: they insert all the documents to which publicity had been given in the whole course of the proceedings subsequent to the sentence of the Benchers; Mr. Digby Seymour’s letter to the *Times*, Mr. Digby Seymour’s protest to the Benchers, Mr. Digby Seymour’s

speech to the electors of Southampton, are all set forth *in extenso* in this article. So far, therefore, as relates to that part of the matter, I am at a loss to see of what Mr. Digby Seymour could fairly complain. If we once arrive at the conclusion that this was matter which might be fairly brought before the public on the ground of Mr. Seymour's position as a member of the Bar, and as a person holding a judicial office, to say nothing of his occupying a political position as a Member of Parliament, it is difficult to see how they could have been brought before the public in a more fair or just manner than they have been, barring an observation appended to these documents after they have been given in detail, to which I shall call your attention in a moment. Well, they give the whole, and then they make their comments. Now, before you can form a proper estimate as to whether those comments are fair and legitimate, as being made by a public writer on a public man, with reference to a matter of so much moment as these charges before the Benchers, you must see what the charges are, and what are the terms of the sentence pronounced by the Benchers. Unfortunately, except so far as you can collect from the documents produced and put forward to the public by Mr. Seymour, and the sentence of the Benchers of the Middle Temple, you have not the charges in any precise and intelligible form before you at all; but certainly you find that, according to the terms of the sentence of the Benchers of the Middle Temple, there was, in their opinion, very grave cause for censure and animadversion in the conduct of Mr. Seymour, in the matter of the charges that had been brought against him. Now, really, I think that, in order to see whether the writer of this article has had his mind imbued with a spirit of hostility, and bitterness, and malice towards Mr. Seymour, you ought to consider the position in which Mr. Seymour stood; because you must do justice to both sides. One can quite understand that Mr. Seymour may have been wounded and pained by these animadversions; and yet, on the other hand, you must consider how far a public writer, dealing with a question of this kind, is, or is not, entitled to take the sentence which has been pronounced, as the basis on which to found the observations he is about to make. This is the sentence:—

“The Masters of the Bench have carefully considered the voluminous evidence and documents which have been brought before them, and have come to the conclusion that the charges in the case of ‘Parker,’ ‘Coutts,’ and of ‘Robertson,’ respectively, are not proved; and that the charge as to a proposal to hold briefs for an attorney in liquidation of his costs payable by you, is proved. The facts and circumstances



which are disclosed fully satisfy the Masters of the Bench of the necessity for this inquiry; and they regret to add that they cannot accompany their intimation to you of their decision on the three charges first named with any declaration that your conduct is not liable to censure; on the contrary, they have the painful duty to perform of stating to you that they find much worthy of severe condemnation, even on the most favourable construction of your actions; that, in Parker's case, on your own statement of your conduct, evidence appears of a want of open dealing towards, and of concealment from, Mr. Parker. Mr. Parker's agreement with you, on your own version of it, was inconsistent with your substitution of your credit for the money you undertook to add to his own, and with the use of his money for any purpose unconnected with the printing scheme. The breach of your agreement in these two respects was not communicated to Mr. Parker, whose consent alone could have justified the course to which you actually resorted. The Masters of the Bench are also under the painful necessity of declaring their opinion that the settlement of Mr. Parker's action, while the charges of fraud included in it were, in the opinion of the Bench, not only not withdrawn, but were strongly re-asserted, as it was conduct calculated to destroy character by exciting suspicions that charges which were not boldly met could not be gainsaid, was an arrangement to which a right-minded man, even in the hour of heavy pecuniary distress, would not have submitted. They are compelled to add that no solid ground presents itself on the evidence in justification of the affidavit which was made by you for the purpose of postponing the trial of the action in question."

Then there are observations which are not of the same importance with regard to Captain Robertson's case; and then they come to the matter relating to the offer to an attorney to pay that attorney's costs by accepting briefs, on which the fees were not to be paid, but were to go in satisfaction of that attorney's claim. The Benchers say:—

"It is conduct, therefore, promoting deception, and likely to generate suspicion where confidence should prevail. If such a practice were tolerated, it would lower the character and honour of both branches of the profession, and would be injurious to the public, not only by reason of such debasement, but also by its tendency to introduce into, or maintain in the practice of their profession, men more distinguished by the pliancy of their principles than by the gifts of nature improved by an industrious and honest pursuit of eminence by honourable means."

Now it is impossible, as it strikes me, to read that sentence, and not to feel that it does carry with it condemnation and censure of a very serious character indeed; it suggests that Mr. Seymour, having received money from Mr. Parker for some purpose common to them both, applied and appropriated that money to his own use



and for his own purposes, as well as the other matters which are adverted to in the course of that sentence. Now if that was so, and Mr. Seymour was in the position of a public man, whose character, although with reference to his private transactions, if thought inconsistent with his public position, was open to animadversion, and the censure of the Benchers is given in the terms in which it had been pronounced, and in which it had been made public to the world, is that a fair matter of complaint? That, I think, would depend upon the circumstances in which it is dealt with. If to the facts stated by the Masters of the Bench, the writer had added facts of his own, he would, undoubtedly, have been responsible for those facts; but if he merely comes forward and says:—"Here is a censure, pronounced by a tribunal of competent authority, made public to the world, affecting the character of a publicman; we bring it forward and say that the man on whom that censure has been passed, and who takes no step to vindicate himself, either by publishing the evidence, and thereby showing that the judgment was fallacious, and ought not to have been pronounced, or by an appeal to a superior jurisdiction, is open to public animadversion, and is not fit to occupy the position of a Barrister, or the position of a Judge, or the position of a Member of Parliament"—Is there anything in that calumnious, or libellous, or beyond the legitimate scope of a public writer? That is a matter for you to consider. You will be very much influenced, I doubt not, by the comments which are made on such a sentence thus given forth to the world. I have already read to you what they say with reference to the contest between Mr. Digby Seymour and the Benchers, as to whether his protest or their sentence ought to have credence given to it; and they say that, until Mr. Digby Seymour takes some step to vindicate himself effectually from the judgment of the Benchers, they must take that sentence to be in accordance with the facts which were before them. Having set out the judgment, and Mr. Digby Seymour's letter and protest, they make these observations, to which I will now ask your attention.

"It is not our intention to enter into any consideration of the specific charges brought against Mr. Digby Seymour, because, like the rest of the public, we are not yet in possession of the means for deciding on their impartiality with a full knowledge of the facts. When we consider that we have on the one hand the deliberate opinion of a number of honourable and distinguished men who have gone fully into the case, and on the other the bare assertion of innocence by an interested person, who declines to take the plain course of publishing a complete statement of the circumstances, and

that person one who publicly stated that the Benchers had given a verdict in his favour, when he held their condemnation in his hands, we cannot hesitate for a moment as to the verdict we must pronounce. Until Mr. Digby Seymour has shown to the public, by a full and ungarbled publication of the evidence given before the Benchers, that their judgment was unjust, we must continue to believe that it was delivered in accordance with the truth, and that the censure therein was merited. Nor is our conviction in the slightest degree shaken by Mr. Seymour's claim to 'a crown of martyrdom,' or by his continually repeated, and never redeemed promise of placing himself right before the world by a public vindication. The last time he has had recourse to this expedient, now thoroughly worn out, was on the 4th of April last, in a letter to the *Times*, which we extract here:—

I do not read the letter in the *Times*, but I go on with what they say—

"The statement which appeared in the newspaper referred to by Mr. Seymour was certainly incorrect."

That relates to the proceeding before the Northern Circuit; it is as to their not having expelled him from the Bar, but simply from the Bar mess. Then, having discussed that, they come, at last, to the question of the conduct of the Benchers; and upon that they pronounce a very strong opinion adverse to that body. That is not the subject matter of inquiry to-day; nor do I desire to express any opinion upon it myself; I therefore pass it over.

"We cannot, however, concur in the idea that investigations before the Benchers into the conduct of every accused member of the Bar should necessarily be held in public. The adoption of such a rule would, we think, be a great evil. The jurisdiction of the Bench is exercised in what has been justly termed 'a domestic forum,' and the nature of such a tribunal is essentially different from that of an ordinary court of law. To parade questions of etiquette, and even of morality, before the public, would be often unjust to the accused, and would add no security to the discipline of the profession. But we are alive to the mischief occasionally produced by the present practice, especially when an unscrupulous man makes capital out of the very privacy which has alone saved him from utter ruin. Perhaps it would be well to give to the accused in all cases the option of a public hearing."

Now those are the observations made upon the sentence of the Benchers of the Middle Temple. I have already pointed out to you that no exception can possibly be taken to the manner in which the defendant, or the writer of this article, for which the defendant is responsible, brings before the public the various documents, from

the sentence of the Benchers down to the last letter and protest published by Mr. Digby Seymour. They are all set forth in this article, and I do not myself see that there is any attempt to add any facts in addition to those stated by the Benchers in their sentence, with reference to these charges which formed the subject matter of inquiry before them. Then the writer proceeds with his comments, and says:—"True it is that Mr. Seymour protests ; true it is that he denies the propriety of the censure which has been pronounced upon him ; but until he takes the course which is open to him for his self-vindication, by bringing before the public the whole of the evidence which was taken, and of which he is in possession, so long as there is nothing but his contrary assertion to meet the sentence which has been pronounced upon him, so long we shall take the liberty to believe that that sentence is well founded, and that the facts upon which it proceeds are to be taken to be true."

It is said that the defendant has not justified ; that is, that he has not put upon the record a plea that all the matters referred to in this sentence were true. I own I think there is great force in the observations of the learned counsel for the defendant as to that ; take, for instance, the case of a man occupying a high public position who might be charged with some offence and be brought before a jury of his country for trial, and a verdict passes against him ; take the case of a man whose conduct is involved in some judicial inquiry, even in a civil suit, in which he is plaintiff or defendant, and in which it transpires that his conduct has been unbecoming, not only of a public man, but of a private individual ; a sentence is passed, or a verdict is given against him, and a public writer, assuming that sentence to be well founded, or assuming that verdict to be right, comments upon that which has become matter of public notoriety and public observation :—"I do not assume the facts ; I do not state them to be so, but I state that this individual, upon whose public character I am now commenting, has been found guilty of a specific offence, or has been declared by a verdict of a jury to be a dishonest man, because he has not paid his debts." The writer comments on that which, for the present, is taken as an admitted and ascertained fact ; he may qualify his observations by saying, "What I say is open still to this,—that the individual thus circumstanced may have his sentence reversed, or may have the verdict which affected him set aside ; but upon the assumption that there has been a sentence or a verdict pronounced by a tribunal of competent jurisdiction and authority, I make my observations."

If the matter is within the province of a public writer to discuss, what say you ; Is he justified in assuming that that which has been pronounced by a competent authority is to be taken as a fact, at all events until the contrary should be made to appear, or, if he comments upon that which has thus become public property, is he to be held responsible in an action for libel unless he is prepared to take upon himself the burthen of proof, although it may involve him in an inquiry of great magnitude, expense, and difficulty ? That seems to me to be the proposition contended for by Mr. Lush. It was competent to the defendant, they say, to put a plea of justification on the record, and establish the truth of the facts alleged by the Benchers in their censure ; in short, to prove to your satisfaction that the sentence pronounced by the Benchers was a proper sentence. I do not know whether you will entertain that view of the matter. The question, as it seems to me, for you to consider is, whether the observations which have been made upon this subject are or are not within the sphere of legitimate and proper observation, or whether the writer of this article has imported new facts, or drawn unwarrantable conclusions from the sentence that has been pronounced by the Benchers adversely to Mr. Seymour.

Now, gentlemen, having got so far, we are in a position to refer to the opening observations which have been so ably commented upon by Mr. Lush on the part of the plaintiff ; and certainly the language used in the article is very strong, and one cannot but regret that a public writer, even if acting within the proper scope of his employment and duty, should not have been more guarded and more moderate in the expressions he used. At the same time, it is certainly open to the observation made by the learned counsel for the defendant, (who addressed to you one of the most eloquent speeches it has ever been my lot to hear in this Court,) that the writer of this article did not proceed to attack Mr. Digby Seymour until Mr. Digby Seymour had attacked the Bar of the Northern Circuit ; and certainly a man who comes into a court of justice to hold another responsible for a hostile attack upon himself, should, in order to entitle himself to the most favourable consideration of a jury, appear before them with reference to the subject matter of inquiry as a man who has not been unnecessarily and wantonly lavish in animadversion and abuse on others. Now how does Mr. Digby Seymour present himself before you ? He goes down to Southampton, and there he is provoked into a sudden and not unnatural fit of temper and indignation, by finding that that which was intended at all events to have been a private censure passed upon him by the Benchers of the

Middle Temple had been bruited abroad, and had been made use of by his opponents, and was about to be flung in his face before a public assembly of the electors of Southampton. If he had complained of that being done,—if he had sought simply to defend himself, and had said, “These are matters which ought not to be gone into, because they are concluded by what passed before the Benchers, or if they are gone into at all it should only be by the publication of the evidence, or by an appeal to the judges, if the thing is open to appeal”—if he had confined himself to that, I quite understand that he would have done no more than it would have been natural for any man to do under the circumstances; but he goes further, he makes attacks upon the Bar, and upon the Benchers of his Inn, which I have no doubt when the writer of this article sat down to pen it were present to his mind, and which provoked a certain amount of indignation against Mr. Digby Seymour, not unnatural in the writer of this article, who, I think, without in the most remote degree knowing who he was, we may pretty fairly assume to have been a member of the Bar. Now he goes down to Southampton, and he makes this speech:—

“Gentlemen, I have now been nearly sixteen years at the Bar. I never won a laurel and never obtained a promotion without a severe and arduous struggle. I came among the members of the Northern Circuit with that misfortune which my countryman, Grattan, has described, I came ‘with the curse of Swift upon me,’ I was an Irishman. I was made from my earliest time the mark of a cruel and jealous opposition, and a determined effort to keep me down if it were possible. But, gentlemen, their efforts failed. Step by step I vanquished one difficulty and another, and won by degrees the honours which I have received, and the dignities which I hold. I obtained a lead at my sessions; I obtained the best Recordership but one on the Northern Circuit; I obtained my rank a short time ago from two judges, themselves formerly members of the Northern Circuit, of Palatine precedence at Liverpool; and finally, notwithstanding all my traducers—ay, and at the very time when detraction was doing its worst, I received the rank of her Majesty’s Counsel from the hands of the late Lord Chancellor Campbell.”

Then he says, with reference to the charges which had been brought against him before the Benchers of the Middle Temple:—

“Gentlemen, the charges, as they are called, which were brought against me, arose out of matters, the youngest of which is seven years old, and the others dated back actually to ten years ago. The men who instigated these charges never showed their faces—my real accusers never appeared; but, beginning with the efforts of a few

individuals on my own Circuit, scandals were whispered about, which at last, by some means or other, which I have not been able as yet to detect or expose, led to the investigation by the Benchers of my Inn."

Then he says :—

"I have gone over the various points which, fairly or unfairly, have been pressed upon your attention, and upon which I have come down, though late, to Southampton in the honest hope that I might receive from you a verdict, such as would tell at once to the public that whatever cruelty I have encountered elsewhere," (that must have referred either to his own Circuit or to the Benchers by whom the charges against him had been investigated,) "however, the dirty fingers of certain members of my own profession have been employed in raking up the scandals of the past for the purpose of dragging up something to damage my reputation, yet that you sympathised with your representative, that you accepted the result, that you saw me still the member of an honourable profession, in spite of malice, and jealousy, and of political hate, still holding the rank which by such hard struggles I attained ; and that you would by your determination, and by your pronounced opinion to-night, trample for ever upon this cruel attempt to call public attention to a matter which hitherto, at least, has been confined to a more limited circle, and has never yet been brought forth and laid before the glare of public day."

Now, gentlemen, it is impossible not to see that Mr. Digby Seymour is there charging the Bar of the Northern Circuit with having set their faces against him, from the earliest time of his becoming an active member of his profession on that Circuit ; that they did that from the mean and miserable motive of keeping out an Irishman from fair competition with themselves ; and that, having failed to prevent him from competing with them and succeeding amongst them, certain members, at all events, of that Circuit have put forth scandalous charges against him—have had recourse to mean and despicable contrivances to injure his character, to prevent his success and promotion, and to crush him. Now, your attention has been very properly called to the fact that, on the Northern Circuit, at the time when Mr. Digby Seymour joined it, there were four or five Irishmen standing high on that Circuit, and distinguished among the distinguished individuals there. Mr. Baron Martin, Mr. Justice Hill, Mr. Baron Watson, Mr. Serjeant Murphy, and others, whose names have been adverted to, were all members of that Circuit ; and to say that any Circuit like the Northern Circuit would set their faces against a man because he was an Irishman, is

an assumption which I hope and trust, though Mr. Seymour may have laboured under some such hallucination, no man of common sense would ever entertain for a moment. Some of the most distinguished individuals who ever adorned the Bar have been Irishmen; some of the most distinguished members of it at the present moment are Irishmen; and I am quite sure that if they were asked, they would not tell you that they had ever met with anything but a generous rivalry on the part of Englishmen. Mr. Seymour may have deceived himself with this notion. A man sometimes gets into an unpleasant position with those with whom he is called on to associate: it is the consequence, very often, of accident or misunderstanding; and the result is, that instead of attributing it to his own fault, his own want of manner, or his own want of powers of conciliation, he ascribes it to jealousy, envy, rivalry, and all sorts of sinister motives. He deceives himself. But if he makes these charges against others, and puts them forward, in that way imputing to them unworthy and scandalous motives, he must not be over sensitive if he is attacked himself. But it does not remain there. Mr. Seymour had this case inquired into before the Benchers of the Middle Temple. Having heard the names of the gentlemen who sat upon the inquiry, as to whom, I need not tell you they are some of the most distinguished members of the English Bar, can you conceive that those gentlemen were actuated by any other desire than that of doing their duty honestly and fairly? Yet, what was the course that Mr. Seymour pursued? Waiving, as he tells you he did, all objection to the constitution of the tribunal, when his own attention was called to the fact, that on one occasion the numbers were not complete; instead of saying, when, at all events, upon the ninth meeting, he was aware of the fact, that the numbers ought always to be kept up to a certain point, "I object to your going on, for on more than one occasion the same members have not been present, and I do not think that reading the evidence is the same thing as hearing the witnesses;" he waives the objection, and goes on with the inquiry. The evidence is all taken, and the case is ripe for decision. Even then it was still open to Mr. Seymour to take the exception that he took afterwards, and he might have said, "Your tribunal has been irregularly constituted, and I object to members who have not been present throughout all the details of the proceeding passing sentence one way or the other." He does no such thing, however; he awaits the sentence, and yet, although there is a judgment of acquittal as to the main charges, there being appended to the judgment or sentence a censure upon Mr. Digby Seymour, Mr.



Seymour sends in a protest, and he also writes to the *Times*, and publishes the sentence; and then we must see how far in these papers which he afterwards publishes, he provokes, by his own animadversion upon the motives and conduct of others, hostile and severe animadversions upon himself. He writes to the *Times*, and he begins thus:—

“The Benchers of the Middle Temple are pursuing to the last the same course they adopted towards me from the first.” What does that mean? “They have ‘screened’ and published their ‘judgment,’ but they have thought proper to suppress my protest. I appeal to you to supply this significant omission, and request you will publish the documents I enclose. There are other grave matters between myself and the Bench, not detailed in this protest, which the publication of the whole proceedings will reveal to the eyes of the profession and the public. I say of ‘the whole proceedings,’ because the printed report furnished to me is not complete. It does not contain all the ‘evidence’ and ‘proceedings’ of the tenth meeting. It does not contain the whole of the documentary evidence put in by myself or my Counsel, Mr. Lush, Q.C. It does not contain the names of the Benchers who voted for or against the various portions of this judgment. This is no longer a case for any half publicity. I am now, by the very act of the Benchers themselves, entitled to have what I demand—the whole truth made known, ungarbled and unabridged.”

Then comes the protest, which is also sent to the *Times*, and which is in these terms; in the first place it goes through the different cases, commenting upon those cases and excepting to the observations or judgment pronounced by the Benchers respecting them. Having done that at considerable length, he appends this:—

“Upon the last paragraph of your judgment, I wish simply to say that I think, having frankly admitted an error, these observations might have been spared,” (that is with reference to his not taking his fees,) “the more so as the Bench must bear in mind that I was placed, as regarded Mr. Brown, in the difficult position in which honesty pointed one way and etiquette another. There is another subject to which I feel bound to call your attention. You have held fifteen meetings, and in no single instance has your parliament been composed a second time of the same members as any previous parliament. In point of fact, therefore, I have been tried before fifteen different tribunals. Your numbers have been equally irregular, varying from a maximum of eighteen to a minimum of seven. One of your number first attended at the fifth meeting, one first at the sixth, two at the ninth, two at the tenth, and one at the thirteenth. The following is an analysis of the attendance of all the Bench.”

Then he goes through the analysis. And then he says:—

“Here is certainly a remarkable disregard both of the spirit and

letter of the wise rule of the society which requires the attendance of the same members on every adjourned hearing of an inquiry into an accusation against a barrister. I have no right to penetrate the secrets of your chamber, but I confess I should like to know how many of those who heard the evidence of Mr. Parker and his witnesses took part, and, if so, what part, in framing or supporting the observations made with reference to that case. I appeal to those members of the Bench who were present at the third meeting, whether the mode in which the evidence of Mr. Parker especially was given did not strongly impress their minds with the impossibility of seriously regarding it. The perusal, more or less careful, of printed evidence (even were it of the most accurate character) can never supply the place of opinions derived from the hearing of the witnesses themselves; and I cannot help feeling that I have been hardly dealt with if members of the Bench who have only formed their conclusions upon the printed reports, intermixed and confused as the various cases are, have joined in reflections which, I firmly believe, would not have been made, or would have been greatly modified, had they attended the inquiry with greater regularity. It may of course be said that my attention was called to this rule, and that I ought, on subsequent occasions to have made objections on the ground of its non-observance; but my attention was not called to this rule till as late as the ninth meeting, though it ought to have been mentioned on the second, and it is obvious that it would, at that time, have placed me in a most invidious attitude to have appealed to this rule with reference to any Benchman I might have objected to. I could not, moreover, for a moment have anticipated that members of the Bench who had not heard the evidence as to any particular case would have suggested observations, or even joined in a judgment, with reference to that case, of the fairness of which they were not, from this very circumstance, in a proper position to decide. On this ground, as well as those I have before specified, I beg to enter my solemn protest against that part of your judgment which contains the observations of which I complain, and which, I rejoice to know, have not received the unanimous approval of the Bench; and I request that this letter may be recorded along with the judgment."

He complains now not only of the tribunal and the irregularity of its composition, but he complains that his protest was not screened together with the judgment; and I must say I think that a more idle complaint never was preferred. In the first place, unless a man is going to appeal from a sentence, I do not understand a protest. The Benchers were either a competent tribunal to deal with the matter or they were not. If they were not, of course it was for Mr. Seymour to except to their jurisdiction, and say that the matter was not properly within it; but if they were, their sentence, unless reversed on appeal, is conclusive. True, if a sentence affects a man's

character he has a right to say, "I will appeal to the public; and the mode in which I will appeal to the public is, by publishing the whole proceedings in the case, with such observations as I think I am fairly entitled to make upon the decision or judgment; but to ask the Benchers to screen this long protest at the same time, as their judgment, I confess, appears to me to be a very unreasonable demand. Here, gentlemen, you have the whole of the proceedings before you, and I think you cannot help seeing that Mr. Digby Seymour did animadvert, both in his speech at Southampton, and also in this protest, and in his letters, very strongly upon the conduct and motives, not only of the Northern Circuit, but of the Benchers of the Middle Temple, before whom this inquiry was conducted. I see, also, that in his speech at Southampton he makes this observation upon the gentlemen of the Bench who were his judges.

"I was upon fifteen different occasions before the Benchers of my Inn, and I stood practically before fifteen different tribunals, because upon no two occasions were my judges the same. The examinations were conducted within closed doors. I would to God they had been conducted in the broad light of day, and before the face of my constituents and the country; they were conducted by men sitting down after dinner, varying in their numbers and attendance, and sometimes postponing the inquiry upon the most trivial grounds. But, gentlemen, whatever feelings were entertained towards me originally, there were many among those Benchers who, I believe, were men of the highest honour, imbued with the spirit of justice, and actuated by feelings of generosity; and to them mainly, and to their indignation at the monstrous wrongs which I was enduring, I believe I owe at last the verdict, which even my interrogator will not deny has been given in my favour."

Now, it is quite clear from that, that he has made observations derogatory to the propriety of conduct, and the motives as well as the decision of the Benchers of the Inn, before whom this inquiry was conducted, speaking of them as men who, instead of holding their sittings by day, sat after dinner, came in and went out as was most convenient to themselves, did not attend to the proceedings as they ought to have done, and finally gave a judgment, (though there were honourable men among them,) many of them from unworthy motives. Those are serious charges, and I cannot help thinking that it would have been better, if Mr. Digby Seymour had been dissatisfied with this sentence of the Benchers, that he should either at once have had recourse to the straightforward mode of publishing the whole of the proceedings, leaving the public to form their own judgment, with any observations he might have thought it right to

make, or that he should have tried what would have been the effect of an appeal to the Judges. You have been told something about his having been advised that an appeal would not lie. It is not for me to say whether it would or would not, because that question might have come before me in my judicial character as one of the Judges of this Court to decide ; but I cannot help saying this,—that if he had taken the course of trying that question, he would, at least, have shut out the writer of this article from many of the observations which he has made use of ; and it is for you, gentlemen, before you finally determine as to how far this language, to which I am about to call your attention, and which in general terms of sweeping censure denounces Mr. Digby Seymour,—how far much of that language, (if you should think it beyond the limits of fair and proper criticism, and therefore libellous, and that which calls upon you for a verdict in favour of the plaintiff,) may not have given rise to these observations, and provoked them, from a sense with which the writer's mind was imbued of the wholesale way in which Mr. Digby Seymour, in his defence against the effect of this censure of the Benchers, was sowing broadcast aspersions on men of the highest character and honour in the profession of the Law. Certainly the language is very strong, and I call your attention to it.

“ Mr. Digby Seymour has lately informed his constituents that he was born an Irishman; but we should have thought that this information, to any one even slightly acquainted with the honourable member, was altogether superfluous. He likewise attributes to his nationality the bitter hostility with which, as he alleges, he was at first received, and has since been maligned and persecuted by his brethren on the Northern Circuit. He came among us, as he says, with ‘ the curse of Swift upon him,’ and gives us to understand that nothing but his unrivalled genius and purity of character could have enabled him to survive and triumph over this natal calamity. Whatever credence we may wish to attach to every statement conveyed in the mild and measured language of Mr. Digby Seymour, we must take exception to the idea that Irish birth constitutes any disqualification for professional popularity or success. An eminent Englishman, himself an ornament to his *alma mater*, when recently comparing in a public address the achievements of the various universities in the United Kingdom, paid a high compliment to Trinity College, Dublin; and as a proof of the rare training given at that seat of learning, he adduced, among other instances, the fact that no less than five out of the fifteen Judges occupying the Bench had received their education in that famous university of Ireland. We believe that only four out of the five are Hibernian by birth,” (one of the five is my brother Crompton—although educated in Dublin, he is not an Irishman) “ but so large a proportion of Irish-

men in the highest judicial position, and the well-earned success of many others from our sister island in the ranks of the Bar, are proof enough that the career of the profession is fair and open to all the Queen's subjects. But it is only just to Mr. Digby Seymour to admit that there are two kinds of Irishmen, and that the cordiality extended to the one is by no means secure to the other. There is the Irish gentlemen, generous, accomplished, and urbane—perhaps the highest type of the genus gentleman to be found in the United Kingdom. There is also the Irish blackguard; swaggering, foul-mouthed, and shameless; the most insolent of upstarts, the most unblushing of swindlers; never destitute of a quarrel, never at a loss for a lie. For as the Irish gentleman is of rare quality, so the Irish blackguard is consummate in his growth. Ireland is always great in extremes, more especially in her psychological productions. She has reared generals who have led their armies to certain victory, and she has reared also the tribe of cabbage-garden heroes. She has adorned our Parliament with splendid orators and consummate statesmen, and has afflicted it also with a breed of bawling demagogues and venal fools. And so it happens that this green and prolific island, with the singular versatility of her race, has supplied to the Bar of England some of its brightest ornaments, and some of its blackest sheep; bestowing on the former a learning and eloquence which Englishmen are proud to admire, and enriching the latter with a power of impudence, and a fertility in fraud which defy all description as (to the uninitiated intellect) they pass all knowledge. Should one of this latter flock find his way to an English Circuit, it could hardly be considered a matter for legitimate surprise if he should become an object of suspicion and dislike, and '*hic niger est*' be the motto coupled with his name."

Now, I think it is impossible to shut one's eyes to the fact that all that has special application to Mr. Digby Seymour. It is much of it general in its terms, but it is evidently pointed to one individual. The distinction between the Irish gentleman and the Irish blackguard admits of easy and immediate application; and so does the difference between the consummate statesman and orator and the bawling demagogue and venal fool, though that is much less important. You may call a man a fool or a demagogue if you are so minded, but when you come to talk of the brightest ornament of the Bar in contrast with its blackest sheep, and the learning and eloquence which Englishmen are proud to admire, and enriching the latter with a power of impudence and a fertility in fraud, which defy all description, I must confess that that is language of considerable strength, and of considerable violence. Its meaning it is for you to determine. If it was meant by that, Here is a gentleman who has been compelled to submit to the ordeal of an

examination before the Benchers of his Inn, in a matter touching most seriously his conduct as a man of probity and honour, and who has been the subject of severe animadversion and censure, arising out of those transactions, and then, not satisfied with bowing to the decision or appealing against it—not satisfied with the opportunity of challenging either public attention to the injustice of the sentence or appealing against it if an appeal be open to him, or submitting to it in a contrite spirit, with a determination to wash out the stain by a life of honour in time to come,—if instead of that he denounces those who passed that censure upon him as unjust judges actuated by sinister and unworthy motives,—if he ascribes the charges to the jealousy and hostility of a Circuit, or the members of it, who he says have persecuted him with bitter malignity and cruelty because he is an Irishman, we say that a man who under these circumstances adopts that line of conduct, is a man whom we may term “a blackguard, swaggering, foul mouthed, and shameless,” and to whom may be justly applied the very strong language that is used in this article.

If you think that that is what is meant, you will make allowance for the language that is used, looking to the circumstances in which the writer was placed by the attacks which Mr. Digby Seymour himself had made on other people, and the way in which he had cast aspersions upon them. If you think that it meant more; that instead of being satisfied with saying “Here is a censure of the Benchers, we advert to that censure, and we say that Mr. Digby Seymour, unless he can get rid of that censure by showing that the evidence did not warrant it, or unless he can get rid of it by means of an appeal, must be considered as having been justly blameable to the extent to which the Benchers have blamed him, and if he was so, he is open to have it said of him that his character as a public man has been tarnished, and to have the propriety of his position as a public man questioned,” if going beyond that they take upon themselves to say, without warrant and without authority, that he is “fertile in fraud, and the most accomplished of swindlers,” it is for you to say how far, under those circumstances, you may think him entitled to your verdict, on the ground that this writer has transgressed the bounds within which a writer canvassing the character of a public man ought still to be confined, or has made the opportunity available for the purpose of gratifying a bitter and vindictive spirit of hostility towards Mr. Digby Seymour. The matter is entirely one for you, gentlemen. If you think that in this case, instead of being a fair, reasonable, honest, and *bonâ fide* comment on the cir-



circumstances relating to Mr. Digby Seymour, this has been made the opportunity of gratifying personal vindictiveness and hostility towards him, and that the writer transgressed altogether the legitimate bounds, it will be for you to show your sense of that by your verdict. I quite agree with what has been said by my brother Shee, that this is no occasion on which to review and revise the sentence pronounced by the Benchers. You have not the materials before you. If that was Mr. Digby Seymour's motive in having recourse to this action, I think it is to be regretted that he should have resorted to it instead of taking some other proceedings in which the merits of the sentence might have been legitimately canvassed.

Gentlemen, the case is entirely for you. You will say whether you think this article contains matter which is libellous for which the writer, or those who are responsible for the writer, ought justly to be held liable. If so, you will say what damages you think are sufficient to compensate Mr. Digby Seymour for any injury he may have sustained; but you will not decide the question of damages, if you think that is a question which you are called on to entertain, without considering the circumstances of provocation which may have excited the indignation of this writer, and led him to apply to Mr. Digby Seymour language which, but for the attacks that that gentleman has made upon others, possibly never would have been used.

The jury retired to consider their verdict at half-past three o'clock p.m., and returned into Court at five minutes past five.

THE ASSOCIATE:—Gentlemen, have you agreed upon your verdict?

FOREMAN OF THE JURY:—We have.

THE ASSOCIATE:—Do you find for the plaintiff, or for the defendant?

FOREMAN OF THE JURY:—For the plaintiff.

THE ASSOCIATE:—With what damages?

FOREMAN OF THE JURY:—Forty Shillings.

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#### REMARKS.

We have given, in the foregoing pages, a full and accurate report, from the notes of the shorthand writer, of the whole proceedings in the trial of the issue raised by Mr. William Digby Seymour against the Publisher of this Magazine. In thus printing, at a considerable sacrifice of space, the summing



up of the Chief Justice, the speeches of counsel, the questions and answers in examination, and even the casual observations made during the trial, unabridged even by the omission of a syllable, we are only pursuing to the end the course with which we commenced this painful business. Chief Justice Cockburn did us no more than right, when he observed that nothing could be fairer than the way in which we had placed before the profession Mr. Seymour's unhappy case. The article on which that gentleman was so ill-advised as to found the suit which has terminated in a manner so little satisfactory to himself, was, to reiterate the words employed by us on a former occasion, "a fair and reasonable comment on notorious facts, written with the same knowledge of the circumstances as the whole public possessed, mis-stating nothing, suppressing nothing, and consisting in a great degree of materials supplied by Mr. Digby Seymour himself." We, in fact, scrupulously collected all the oral and documentary testimony of his own character and conduct which Mr. Seymour, in the spring of last year, lavished on the world. We gave that letter of his to the *Times* which denied that he had been expelled from the Northern Circuit, and which omitted the fact that he had ceased to be a member of its Bar Mess. We gave without curtailment his protest against the judgment of the Benchers. We gave in all its truthfulness and modesty his defence before his constituents at Southampton. We narrated his history, so far as it is known to the public, and as it is generally reported at the Bar. If the evidences with which his tongue and pen had so industriously supplied us were otherwise than pleasing to Mr. Seymour, this result was no fault of ours. Nor was it our fault that we failed to supply the public with further and fuller information. We are not to blame because the Benchers of the Middle Temple persistently resolved, for reasons good or bad, to withhold the publication of the evidence given against Mr. Seymour, nor because the explanatory statement of that gentleman was unprinted, or inaccessible at the time of the

publication of our article.\* We did what we could ; we published all that came to our hands ; we set down certain notorious facts ; we commented upon those facts and the evidences in language that we never used before, and trust that our duty will never again compel us to employ concerning any member of the profession, least of all a Recorder and a Queen's Counsel ; and we cheerfully accepted the verdict which assessed that language at the sum of forty shillings when applied to the character and career of Mr. Digby Seymour.

But before dismissing the subject from our pages, we are bound to set our readers right on one point at least which affects the character of this periodical. It was insinuated by Mr. Lush, more than once in his observations to the jury, that the article on Mr. Seymour was written by some one who was actuated by a bitter personal hostility against him, who was a member of his Circuit, and one at least of the instigators of the proceedings before the Benchers. We are informed, moreover, that some days before the trial, and during its progress, the name of a barrister on whom it was thought convenient to fix, and to whom "internal evidence" was supposed to point, was sedulously circulated in Westminster Hall as that of the author of the article. The idea was no new one with Mr. Seymour, whose singular idiosyncrasy it is to believe or to represent himself the injured object of an envious conspiracy laid by all the eminent members of his profession ; who has imputed to the Northern Circuit a "cruel opposition and a determined effort to keep him down ;" who has accused the Benchers of the Middle Temple of "injustice," and of making "every presumption against him ;" and who will probably, in

\* Mr. Lush asserted that the statement had been circulated before the publication of our article ; *i.e.*, before the 1st of May, 1862. We are confident that the learned counsel must have been mistaken in his dates ; we cannot ascertain that any one saw or heard of the pamphlet until some time after this. To this hour, as far as we are aware, it has not been published, nor has any copy reached our hands which has not been marked "for private circulation only." We may observe that the pamphlet does not contain the whole of the evidence before the Benchers, and that what does appear is not printed in a connected form.

his next speech to a Southampton audience, ascribe his failure in obtaining damages against our publisher, to the professional jealousy of the Lord Chief Justice, and the notorious corruption of Middlesex special juries. But we are astonished that Mr. Lush, an honourable man, commanding the respect and confidence of the Bar, should have uttered, or should have insinuated, against this Magazine, the disgraceful imputation that its pages were suffered to become the vehicle of any private animosity. We do Mr. Lush the justice to believe that he will feel no ordinary regret for the studied innuendoes he employed, when he reads our solemn assurance that the article in question was not written by any member of the Northern Circuit, nor by any one connected with or even cognizant of the charges brought against Mr. Seymour, or deriving any knowledge of the case from any source other than those open to the whole public, nor by any one personally hostile to the gentleman in question. The idea evidently predominant in Mr. Lush's mind when he opened his case to the jury, that the author of the article was some one whose name he would fain have uttered, in the belief that the utterance might have suggested personal animosity, was in truth "the baseless fabric of a vision." No doubt the author of the article, in common with his brethren in the profession, may have felt no ordinary anger at the unworthy accusations brought by Mr. Seymour against a large section of the Bar; he may have been indignant to hear meanness, cowardice, and envious oppression imputed to a body of men, who, whatever their other faults, are at least free from these miserable vices. Such indignation was not only excusable, but natural and just, and needed no personal differences to point its sting. The pages of this Magazine were never degraded to a quarrel.

We regret that we are constrained to comment on another part of Mr. Lush's remarks. He thought fit to palliate, if not to defend, the bargain made by Mr. Seymour with an attorney to pay a debt due to that attorney by holding briefs

on which the fees should be marked, but should not be paid. Forced to admit that such a bargain was unprofessional, Mr. Lush was pleased to affirm that it was nevertheless "an act of honesty." We protest strongly against the use of language of this sort on such a subject. In the first place, we deny that any act which is wholly unprofessional can also be honest. Every man who enters our profession does so under the implied obligation that he will abide by its rules and usages, that he will take no unfair advantage of his brethren, and that he will comport himself as a man of honour and a gentleman. He who violates those rules and usages, and *secretly* violates them, whether to obtain practice or to relieve himself of difficulties, is not acting honestly towards the body to which he belongs. But, in the second place, we condemn the morality which ignores all view of the client in judging of such a transaction. Granting for a moment that the bargain might be defensible as between barrister and attorney, what sort of honesty does Mr. Lush esteem it towards the public? Both branches of the profession enjoy a monopoly, but they enjoy it only on public grounds and for the public good. The Bar are entrusted with the privilege of exclusive audience in order that suitors may be assured of an independent and incorrupt advocacy. Attorneys are protected by statute in the sole exercise of their peculiar functions, that their clients may approach them with a full confidence in their professional integrity. Are we then to be told that a bargain made by a solicitor to employ, for his own pecuniary gain, a particular counsel, to the exclusion of other, and it may be better men, is, on either side, an act of honesty? That a secret agreement between A. and B. to pay B. the debt due by A. out of C.'s unsuspecting pocket, is a transaction which is even to be palliated? We are startled by the standard of honour necessary to the conception of such a sentiment. Those who account such conduct honesty should at least have the grace to add with the dramatist,—

"This indeed is frugal honesty,  
A thrifty, saving honour."

For ourselves, we unhesitatingly denounce such a bargain as a conspiracy against the public, and its defence as an insult to the Bar.\*

So far as his quarrel with this Magazine is concerned, we have done with Mr. Digby Seymour, and were he simply a practitioner at the bar he might take his forty shillings and depart in peace. But there is a grave question which the interests of the public compel us to keep before them:—Is Mr. Digby Seymour to continue Recorder of Newcastle? The answer to this question rests on much more narrow grounds than any inquiry touching Mr. Seymour's worthiness to remain a Queen's Counsel or a member of the Bar. In the latter case, some overt act, committed within a reasonable time before the investigation, and proved beyond doubt, might be fairly required, and the fifteen Judges would probably hesitate to sanction a disbarment on any grounds less than these. But we apprehend that the position of a criminal Judge has far higher requirements as to character than the mere absence of specific proof of guilt. A man entrusted with judicial functions, in the upright exercise of which the liberty and reputation of his countrymen are concerned, must be not only above guilt, but above suspicion. No verdict of "not proven," qualified by heavy censure, can justify the continued occupation of the criminal bench. The

\* It will appear from some observations which fell from Mr. Lush, that he doubts the correctness of the assertion in the article, that "an unknown member of the Bar has been expelled from its ranks for offences certainly not greater than the charge which the Benchers say was proved against Mr. Seymour." Mr. Lush asked (see page 213) to what case we could allude. We will tell him. About the time when Mr. Seymour was on his trial before the Benchers of the Middle Temple, a barrister, of the name of Claydon, was arraigned before the Benchers of Lincoln's Inn for breaches of professional etiquette, such as taking briefs without the intervention of attorney, advertising for business, &c. He was found guilty, and was disbarred. Is Mr. Lush prepared to say that equal justice was meted out in these two cases? Does he think that a Queen's Counsel and a Recorder should be allowed to get briefs in any way he can, with mere censure, while a poor and struggling man should be disbarred for conduct of a like nature? If Mr. Lush *does* think so, which we can scarcely believe, we trust that he is singular in his opinion.

public and the profession are equally bound to bestir themselves in the matter. The nation has long survived the evil which once sorely afflicted it—a corrupt and time-serving Bench, and a confidence, absolutely unlimited, is now reposed in the independence and integrity of the Judges. But that confidence will be shaken, and the efficiency of the administration of justice will consequently be lowered, if any grade in the judicial hierarchy should be suffered to fall into disrepute. If nothing is done by the Home Secretary, we trust that some independent member of the House will bring the matter forward. It is comforting to know that in such a case Parliament will offer every facility to Mr. Seymour to bring the whole evidence touching his character before the public, and thus at one triumphant blow to demolish his enemies, and exhibit his own innocence clear as the noonday. Some people are simple enough to ask why this has not been done already.

There is, at any rate, one beneficial result to which this unpleasant scandal is likely to lead. The Bar has been so stirred by the disclosures that have been made, and so general an impression has arisen as to the inefficiency of the present arrangements for the preservation of a becoming discipline, that a movement has already been begun to effect a re-organization of the profession. It is felt that the time has arrived when the Bar of England should have a corporate existence, and speak publicly with one voice; when it should be able to legislate for its own affairs, and maintain its own honour, and when the public should be put in possession of some authoritative expression of its views on legislative and other questions affecting its interest and status. So far as we are aware, every other body of advocates existing in Europe is united under a single government, and has the advantage of corporate action. The English Bar, alone, is crippled by a mediæval division into four diverse societies, and has no power of dealing with its own regulations, or asserting its opinion as a

whole. It is not surprising then that, while we write these lines, an effort is being commenced, "having for its object the better organization of the profession, and its union in a corporate body, for the maintenance of its honour and dignity, for the expression of its united opinion, for the preservation of a proper discipline among its members, and for the advancement of the science of jurisprudence." Such are the terms of the document which has reached our hands, and which, we believe, has already received influential adhesions. If the rumour be correct, that an eminent member of the Bar, himself a Bencher, is prepared to introduce a measure into Parliament embodying some such idea as that sketched out above, the Bill would probably command almost universal assent. The recent action against the Benchers of the Middle Temple has shown that, unless the Bar is to sink into public ridicule, some steps must be taken for the better administration of its business; we have no hesitation in avowing our opinion that self-government is the true remedy for the present evils; and if so great a reform should result from the recent litigation, we shall always rejoice that the LAW MAGAZINE stood boldly in the front, and showed itself ready to face pecuniary loss rather than to fail in its duty, or to compromise the interests of the profession.

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## ART. II.—THE RIGHTS, DISABILITIES, AND USAGES OF THE ANCIENT ENGLISH PEASANTRY.

### PART V.—*Love-boons or Boon-days, and Holidays.*

IT is rather remarkable that the word "average," which has two distinct meanings as a technical term, in addition to its common and popular signification, should have been employed with a two-fold intention in the last number of the LAW MAGAZINE. While one contributor used "average" in the peculiar sense which it bears as a term of maritime law,



another made it mean land-transport and carriage, if not any service that can be done by a beast of draught or burden. Averpenny and aversilver anciently meant money paid instead of such service. Averpenny more than once occurs in Boldon Book; and in the same record, we meet with the forms averype and averere, which are derived from the Saxon words *ríp* (reaping or harvest), and *erian* (to plough) or *yrth* (tillage). Each villein at Boldon, in the year 1183, was required to reap three roods of averype and to plough three roods of averere.\*

The service of tillage, called grass-erth, mentioned in the laws of landright, was in return for the privilege of feeding cattle in the lord's open pastures. The Saxon boor ploughed two acres of *gærs-yrthe*, and might be allowed to plough more if he required more pasture. In the year 1279 a yardlander at Newington, in Oxfordshire, was bound to plough an acre of winter tillage, called *gerserthe*; for which service he might have common in the lord's pastures from the 1st of August until Mid-Lent. At Sturminster Newton, in Dorsetshire, certain tenants came upon the lord's grass-land on the morrow of St. Martin's Day with as many teams of oxen as they could bring; and they ploughed four acres of the land with each team; they brought seed from the hall, to sow the land; and afterwards harrowed it. This service entitled them to feed their oxen with the lord's oxen from the time that the meadows were mown until the cattle were housed. The term *gærs-yrthe* was extant in the year 1363, at Piddington, in Oxfordshire; according to a rental of that year, the teams of the customary tenants came to plough the lord's land on a certain day chosen by the bailiff, within four days after the Feast of St. Michael; this service was called *grashearth*, and

\* *iii<sup>4</sup> ob de auerseluer eo quod non debeant longius auerare quam ad Granarium sancti Pauli. (Dom. S. P. 90.)*

*xvi de averpenyng . . . metnat iii rodas de auerype, et arat iii rodas de auerere. (Boldon-Book.)*

*cellarius libere solebat capere omnia sterquilinia ad suum opus in omni vico, nisi ante ostia eorum qui habebant Averland. (Joc. de Brakelond, 3 Monasticon, 164.)*

it was done in order that the lord might raise no hedge, and might make no several pasture in the fallow field to exclude the cattle of the tenantry.\*

The Saxon boor, in addition to grasserth, ploughed three acres of gafolyrthe; that is, ploughing done in satisfaction of his gafol or rent, as well as three acres of benyrthe, or optional tillage, done as a *boon* to the lord,—done out of grace and kindness, not in the way of duty. The terms, averherthe, gaviherth, grashearth, and benerth or bedhurth, were used as late as the time of Edward the Second; and the exact phrases employed in the old Saxon laws of Landright to describe the services of benerth and grasserth recur in rentals of the fourteenth century.†

\* to-eacan tham iii æceras to bene and ii to gærs-yrthe, gyf he maran gærse betyrfe thonne earnige thæs sva him man thafige. (Laws of Landright).

quelibet caruca debet arare duas acras quod vocatur Greserthe et pro illa arura debent omnes communicare infra dominicum absque gravimine. (2 Hundred Rolls, 754, also 761.)

In crastino S. Martini . . . debent convenire super herbosam terram domini et congregare tot carucas boum quot poterunt de suis propriis et arare cum unaquaque caruca iiii acras dicte terre et ibunt ad curiam domini Abbatis propter semen ad dictam terram seminand' et illam terram seminabunt et cum caballis suis eandem terram herciabunt et notandum quod propter predictum servicium omnes predicti viri habebunt tot boves quot habent proprios pascentes cum bobus dominicis ubique post falcationem pratorum usque presepe ligentur. (Add. 17450, f. 43 b.)

venient omnes carucæ infra villam de Pydinton ad arandam terram Domini uno die quem eligere voluerit Ballivus infra quatuor dies proxime post Festum Sancti Michaelis, per summonitionem Ballivi vel Præpositi, quod vocatur Grashearth: et hac ratione quod Dominus hayam nec pasturam separabilem faciet ab hominibus infra campum warectabilem. . . . (Kennet, 495.)

† His gafol-yrthe iii æceras erige . . . iii æceras to bene . . . . (Laws of Landright.)

De qualibet caruca arant unam acram de 'auerherthe . . . Item sunt x acr' et di' de Gaviherth . . . Item de qualibet caruca i acr' de Gresherth. (Add. 6159, ff. 24 b, 28.)

tenebit unam carucam ad quaslibet sea precarias arare que vocantur Benerthe. (2 Clutterbuck's Herts App.)

arabit ad Bedurtham et Gresurtham.—(Add. 17450, ff. 164 b, 168.)

pro amore non pro debito. (Custumale Roffense.)

iii acras precum et duas de herbagio (ii to gærs-yrthe). (Laws of Landright.)

ii acras de Gersherde et iii acras ad preces. (Add. 6159, f. 161 b.)

Under the name of the Laws of Landright, we cite the document usually called Rectitudines Singularum Personarum.

Bedrip is of course a compound of béd (a prayer or petition) and ríp (harvest). Bedrip was optional service in the harvest field; compulsory reaping was called nedrip or nedirip, (necessary reaping,) perhaps also called gavilripp.\*

The kindly services rendered to the lord in seedtime and harvest were otherwise called precatons, (preces, precaria, precationes,) gifel-works, and love-boons.† The days on which they were rendered used to be called boon-days, and occasionally love-days; a love-day more commonly meant a law-day, a day set apart for a leet or manorial court, a day of final concord and reconciliation:—

Now is the loveday mad of as fowre fynially,  
Now may we leve in pes as we were wonte:  
Misericordia et Veritas obviaverunt sibi,  
Justitia et Pax osculatæ sunt.—(*Coventry Mysteries.*)

A large part of the lord's arable land was entirely cultivated by the tenantry. The customary tenants at Cokefield, near Bury, ploughed 200 acres of the demesne in a year. The dominical plough-lands there consisted of 333 acres. We need not suppose that the tenants ploughed up two-thirds of this area; they ploughed each acre more than once; and the

\* *Biddath* thæs *ripes* hlaforð, thæt he sende wyrhtan to his *ripe*. (Pray ye, therefore, the Lord of the harvest, that he will send forth labourers into his harvest.)

benyrthe, id est araturam precum, et benripe id est ad preces metere et pratum falcare. (Laws of Landright.)

Benerth is defined by Sir Edward Coke. (Co. Litt. 86 a.) There are many strange compounds in the rentals. Lage erthe or laverthe. (Dom. S. P. lvi. 3.) Gavilripp. (Add. 6159, f. 172 b.) Nedripp, nedirip. (2 Hundred Rolls, 765, 766, bis.) Metebedripe and Middleyesrype (2 H. R. 723.) Hingbidripe. (Spelman—Bidripa.) Hungeryvedripp. (Spelman—Precariæ.) Wytebedripe. (2 H. R. 515.) Wedbedrep and bountebedrep. (Harl. 3977, f. 108.) Wardbedrep. (f. 86 b.) Wardacras. (Dom. S. P. 72.)

† opera scilicet de dono que vocantur yeuelwerkes. (Add. 6160, f. 74 b.) precar quam vocant luwebene. (Harl. 3977, f. 91.)

facit xiii loue bones et valent xiii<sup>s</sup>. (2 H. R. 482.)

Love-boons, that is the voluntary labour of the inhabitants of the neighbouring townships. (1 Nicolson and Burn, 525.)

The truce between the Yorkists and Lancastrians in 1458 was called a Love-day.

record means that their labour was equal to the single tillage of 200 acres.\*

In large manors a *benerth*, or arable precation, was a matter of difficult arrangement. It was the reeve's duty to ascertain whether a tenant intended to do the service, or chose rather to pay for a substitute. Bond tenants, free tenants of bond land, and freehold tenants alike took part in these operations. The reeve had to deal with persons of both sexes and of all conditions. Some of the contributors of labour were knights, and gentlemen, and ladies of quality; others were independent yeomen, surly farmers, and poor widows. The gathering of the ploughs must have made a remarkable sight. Soon after dawn, on the appointed day, the tenants met the lord's officers in the field. Tenants who came without oxen were employed in delving and in making fences; tenants who came with single oxen, or with less than an entire team, were associated with others; and thus all the oxen and cart-horses present were sorted in teams of about eight animals. The teams were marshalled by the beadle, who carried his wand of office, not quite a bare symbol of authority, for we dare say it

\* omnes tenentes ejusdem villatæ debent quater venire per annum ad pastum domini ad precarias carucarum; illi scilicet qui carucas habent per se vel junctas cum aliis, et qui nullum istorum habent per ordinacionem servientis vel Bedelli curie claudent sepes et hujusmodi. (Dom. S. P. 86.)

To erie his half acre holpen hym manie;  
Dikeres and delveres digged up the balkes . . . (*Piers Plowman*.)

carucas dominicas adeat, custumarias, et adjutrices, prospiciens quod antequam dietam suam plenè paraverint, minime disjungentur. (2 Fleta, 73.)

arabunt terram domini in dicto manerio eodem modo et in tantum quo terram propriam absque fictione. (Kennet, 320.)

Debet arare ter in anno sine cibo domini, quæ vocatur *laverthe* et semel in anno ad cibum domini quæ vocatur *benerthe*. (Dom. S. P. lxvi.) *falcant* usque ad vesperam. . . et tunc habent *corrodium*. (*Boldon-Book*.) *sarclare*. . . usque ad horam nonam et si dominus illum pascit usque ad vesperam. (Add. 17450, f. 25.)

veniet ad *Beneharvyng* cum equo suo. (2 Clutterbuck's Herts, Hatfield.) quilibet equus *hercians* habebit qualibet die tantam de *avenis*, sicut capi potest inter duas manus. (*Spelman, Precarie*.) tres *pugillatas avene* ad equum suum. (Dom. S. P. 34.)

venit ad iii *Bedweding*. (Add. 17450, f. 96 b.)

was used upon inert husbandmen, as well as upon inert oxen. The reeve took care that each team did its full work *absque fictione*, without pretence; that the ploughmen worked as well for the lord as they would work for themselves; and that the teams were not unyoked until the work had been fairly done. The day's work was supposed to be complete at the ninth hour, three in the afternoon according to our reckoning. This hour was called nones, or high noon, and a meal then taken was called a noonshun or nunchaeon. Some of the ploughmen engaged in an arable precaton had a meal from the lord, but there was no regular feast; a tenant employed in the lord's service was not usually *ad cibum domini*, that is, entitled to a meal, unless the service kept him occupied an entire day. A boon-harrowing, with horses, succeeded the benerth; each horse that harrowed was allowed two or three handfuls of oats. In due time there followed a bedweding, or weeding boon.\*

A bedrip, reaping boon, or autumnal precaton, was even a more pompous festival than an arable precaton. In old times, as at the present day, the harvest was made a season of merriment, if not of thanksgiving:—

In tyme of hervest mery it is ynough;  
The hayward bloweth mery his horne,  
In eueryche felde ripe is corne.—(*Romance of King Alisander.*)

In the illustrations of an old Saxon Calendar, in the Cotton Library, the hayward is shown standing on a hillock, cheering the reapers with his horn. Slumbering reapers were roused by the sound of a horn in Tusser's time; and the custom of blowing horns at harvest endured until the end of the last

\* Dominus Johannes Terell miles. . . mittet duos homines ad magnam precariam ad cibum domini et unum overman. (Add. 14850, f. 63 b.)  
cum omni familia domus excepta Husewiva. (Baldon-Book, passim.)  
cum omni familia præter hospitissam. (3 Monasticon, §18.)  
præter uxorem suam que custodiet domum suam. (2 Hundred Rolls, 636.)  
debent invenire omnes servientes suos locatos per annum excepta uxore sua et nutrice et pastore ad ii precarias. (2 H. R. 748.)

century, for it is noticed by John Scott, of Amwell. In the thirteenth century, when the rentals were mostly compiled, the lord was aided in harvest, as in seed time, by tenants of all ranks. A superior tenant rarely sent more than two men to the bedrip, or two men and an *overman*, that is a foreman. A customary tenant in some places was bound to appear on the grandest day with his whole family, excepting the housewife, who stayed at home and span; sometimes, excepting the shepherd and the nurse as well as their mistress.\* At Elsefield, near Oxford, in the year 1279, all the men who held yardlands, and all who held half-yardlands, came to two autumnal precatations, each of them with one man; and to the third precatation each of them came with his whole family, excepting his wife and shepherd, and was regaled by the lord on this third day,—not on the two former days; and all the customary tenants were obliged to ride beyond the lord's crops, to see that they were reaped safe and well. They rode in saddles, with bridles and spurs; if they failed in any part of this equipment, they were fined. These mounted overseers were called reap-reeves. In the time of Edward the Third, the tenant of an estate called Fawkner Field was bound to ride among the reapers in the lord's demesnes, at Isleworth, on the bederepe day, in autumn, with a sparrow-hawk upon his wrist.† The officers of the court were entitled to a share of the crop. In some places, the sicklemen received a work-sheaf each; each man was expected to reap half an acre, called a deywine (day-win) or day's labour.‡ In the accounts

\* Et omnes custumarii equitabunt ultra blada domine salvo et bene metenda. Et equitabunt in sellis cum frenis et calcaribus. Si quid eis deffecerit de atillo amerciabuntur. (2 H. R. 720.)

debet esse ripereve per iiii dies ad mensam domini. (693.)

Repe, other be a repe-reyve and arise erliche. (2 Wright's Plowman, 513.)  
faciet iii precarias dicto Priori et i lovebon' et veniet ipse cum virga (2 H. R. 626.)

Blount. Frag. Ant. 323.

† habebunt quolibet die i garbam inter se omnes separand' que appellatur workcef. (2 Hundred Rolls, 85.)

of the tenures at Bocking, in Essex, there is a curious estimate of the cost of these autumnal precatons. The expense of the food provided for the reapers is weighed against the value of their work, and the balance in the lord's favour is found to be five pence and three farthings. The said tenants ought to find at the two bedrippes in autumn 146 men, and these works will be worth twenty-seven shillings and eight pence, at two pence each man. Towards the doing of these works, the said tenants will have five seams and three bushels of wheat and rye, worth at the average price of corn seventeen shillings and eleven pence; moreover, they will have at the first bedrip, a carcase of beef, worth five shillings; and they will have at the second bedrip, two hundred herrings, worth twelve pence; then they will have at the first and second bedrip twenty-one cheeses and a half, worth 2s. 9½d., the price of each cheese being a penny halfpenny; they will have two bushels of peas, which may be estimated at 5d., salt and garlic at a penny. And, therefore, the lord clears out of the two bedrips, five pence, one halfpenny, and one farthing. In this case the treatment of the reapers was rather poor; it was no more than a dry bedrip. It would have been a wet bedrip, or an ale bedrip, if the lord had allowed good liquor.\* A yardlander at Chalgrave, in Oxfordshire, reaped at the two precatons in autumn with all his household but his wife and shepherd; if he brought three labourers, he walked with his

metet per vi dies videlicet qualibet die dimidiam acram quod servicium vocatur Deywine. (779 and see 602.)

\* Item debent dicti tenentes invenire ad duos bedrippes in autumnno cxl et sex homines et valent dicta opera xxvii<sup>s</sup> viii<sup>d</sup> pr<sup>s</sup> hominis ii ad quæ opera facienda habebunt dicti tenentes quinque summas et tres busellos de frumento et siligine et valet dictum bladum per communem æstimacionem xvii<sup>s</sup> xi<sup>d</sup>. Item habebunt ad primum bedripp unum Carcoys bovis precii v<sup>s</sup> habebunt eciam ad secundum Bedrip ce allec<sup>s</sup> precii xii<sup>s</sup>. Item habebunt ad primum et ad secundum bedripp viginti et unum caseos et dimidium et valent ii<sup>s</sup> ix<sup>d</sup>. qū prec<sup>s</sup> casei i<sup>d</sup> ob<sup>s</sup> habebunt et ad primum et ad secundum bedripp duos busellos pisarum et valent per estimacionem v<sup>d</sup>. Item habebunt sal et all pr<sup>s</sup> i<sup>d</sup> et sic remanent domino de claro de duobus bedripp<sup>s</sup> v o.<sup>s</sup> q.<sup>s</sup> (Add. 6159, f. 189.)

Ad omnes precarias veniet tam siccas quam madidas. . . (Dom. S. P. 66.)



red, or rode, in front of the reapers ; if he brought no labourers, he worked in person ; for two repasts, at nones, a wheaten loaf, pottage, meat, and salt ; at supper, bread and cheese and beer, and enough of it, with a candle while the guests were inclined to sit.\* The last day of the bedrips was always the grand day. At Piddington, the tenants and their wives came on that day with napkins, dishes, platters, cups, and other necessary things.†

Tenants in old times were required to cut and clear the lord's hay-field. A tenant at Badbury was bound to mow the lord's meadow for one day, receiving a meal of bread and cheese twice in the course of the day ; and was afterwards to carry the same meadow, receiving a rickle, or bundle of hay, for his pains. The mowers, also, received among them either twelve pence, or a sheep, which they were to choose out of the lord's fold by sight, and not by touch. In other places, a mower was allowed haveroc', that is, as much grass as he could raise upon his scythe, without breaking its handle ; and a haymaker received a perch of hay, called in English soylon, or a portion of hay called in English a yelm, which was as much as he could grasp with both arms. At Sturminster, a tenant, after Langmead had been mown and carried, received haveroc' and medknicc', that is, a knitch of hay, as much hay as the hayward could raise with one finger to the height of his knee.

In the year 1308, it was the rule at Borley that the mowers and haymakers should have two bushels of wheat for bread, a wether worth eighteen pence, a gallon of butter, the second best cheese out of the lord's dairy, salt and oatmeal for their

\* metet ad ii precarias in autumpno cum tota familia operant' preter uxorem et bercarium et si habeat iii homines operantes ibit cum virga sua vel equitabit ultra metentes et si neminem habeat operantem personaliter operabit ad duo repasta scilicet ad nonam panem de frumento potagium carnem et sal et ad cenam panem caseum et cervisiam et sufficienciam et madel' dum sedere voluerint. (2 Hundred Rolls, 788.)

† ad prandium secunda die venient ipsi et uxores eorum cum mappis, discis, paropsidibus, cyphis, et aliis necessariis. (Kennet, 495.)

pottage, and the morning's milk of all the cows; a mower received for every day's math as much grass as he could lift upon the point of his scythe. In 1222, each mower at Wickham, in Essex, had a loaf and a half to himself; and they had, in common, a cheese and a good ram.\* A sheep was very commonly the reward of work in the hay-field. Old English husbandmen were very fond of mutton, and the hay-harvest falls about St. John's day, when mutton was considered in season.†

Sheep-shearing was another service imposed upon the tenantry. Although it must be hard and heavy work to wash

\* habebunt de consuetudine quod vocatur medsaïpe ii multones secundos meliores in ovile domini, vel ii loco prædictorum ii multonum. (2 Hund. Rolls, 756.)

unum diem ad pratum Domini falcandum ad cibum Domini, vel Dominus dabit quadraginta denarios pro metteshep. (Kennet, 495.)

falcare per unum diem pratum et habere coregium suum de curia bis in die scilicet panem et caseum et levare idem pratum et habebit inde unum richel et debet dicta Alicia et alii qui sunt de eadem tenura de qua ipsa est habere xii<sup>4</sup> illo die quo falcant domino vel unam ovem de faldâ domini quamcunque elegerint sed per visum et non per tactum. (Add. 17450, f. 27 b.)

Rickle—heap of stones or peats, etc.—(Waverley Glossary.)

. . . a rickle of houses. . . (Monastery, c. xiii.)

quando falcât pratum domini debet habere haueroc' scilicet tantum de herba quantum poterit cum manco falcis sue levare et quando levât pratum domini debet habere unam perticam feni quod anglice dicitur soylon. (Add. 17450, f. 28.)

quando levât pratum domini habebit unam particulam feni quod anglice dicitur zulm. (f. 183 b.)

Iffley] debent spargere fena domini et levare et quilibet eorum habebit die quo operabitur unam quantitatem feni cum rastell' factam que Anglice dicitur Yelm. (2 Hund. Rolls, 712.)

Yelm, as much corn in the straw as can be embraced with both arms. (Leicestershire Glossary, by the Rev. Dr. Evans.)

carriabit fenum domini per unum diem cum i carecta et habebit per stipendia in vespere quantum poterit imbraciare de feno. (2 H. R. 775.)

medkniche, scilicet tantum de feno quantum hayward poterit levare cum medio digito suo usque ad genua sua. (Add. 17450, f. 39 b, 40 b, 41 b.)

Et sciendam quod quandoque ipse cum aliis custumariis ville falcaverint pratum . . . habebunt ex consuetudine iii bussellos frumenti ad panem et unum hurtard' precii xviii<sup>4</sup> et i lagenam butyri et unum caseum ex daeria domini post meliorem et sal et farinam auene pro potagio suo et totum lac matutinale de omnibus vaccis totius daerie ad ipsum tempus . . . Et habebit pro quolibet opere falcationis tantum de herbagio viridi cum falcaverit quantum poterit levare super punctum falce sue . . . (Add. 6159, f. 20 b.)

† entur la seynt Johan les vendet kar dunk est char de meton en seyson. (Waler de Henlee, Add. 6159.)

and shear sheep, in the thirteenth century it was done by women, who are called shepsters in the "Vision" of Piers Plowman. The sheep were washed in the mill-pond. The miller at Ashbury, who held a yard-land with his mill, was required to wash the lord's sheep, and to be at the shearing, and to wind the lord's wool. Shearers were usually entitled to the wambelocks, or loose locks of wool under the belly of the sheep; at Weston, in Oxfordshire, a shearer had the wambelocks, or a penny instead of them.\* The finest part of the fleece is the wool about the sheep's throat, called in Scotland the haslock or hawse-locks:—

A tartan plaid, spun of good hawslock woo',  
Scarlet and green the sets, the borders blew.—(*The Gentle Shepherd*.)

Up in the North, they call a sheep-shearing the clipping-time. To come in clipping-time is to come as opportunely as he who visits a farmer at sheep-shearing, when there is always mirth and good cheer. In 1279, the shearers at Swincombe, in Oxfordshire, had a new cheese in common, and each man had a loaf, and half a loaf instead of a lamb.† In the time of Henry Best, the middle of the seventeenth century, clippers always expected a joint of roasted mutton. There is an account of the good things usually furnished for a sheep-shearing feast two or three hundred years ago, in Brand's "Popular Antiquities," but there is no reference in Brand to an old drama called "The Winter's Tale:—

\* ad oves lavand' et tondend' unam mulierem inveniet. (2 Hundred Rolls, 759 bis.)

Debet invenire unam tonsatricem in tempore tonsionis. (Delisle's Norm. Agri. 82.)

Clipping 'is in the Channel Islands performed by women, slowly but neatly. (Report, 183.)

debet lavare oves domini et esse ad tonsionem vel involvere lanam domini. (Add. 17450, f. 172 b.)

tondere oves et habere Wambelokes. (Dom. S. P. 47, 91.)

adjuvabit tondere et lavare oves dicti Simonis et habebit wambelok scilicet quilibet eorum, vel quilibet habebit unum denar'. (2 H. R. 817.)

† debet et lavare et tondere oves cum i homine et habere caseum illius diei in communi et i panem et pro agno dim' panem. (2 H. R. 758 bis.)

“Let me see,” ponders the clown,—“what am I to buy for our sheep-shearing feast? Three pounds of sugar, five pounds of currants, rice,—what will this sister of mine do with rice? But my father hath made her mistress of the feast, and she lays it on. . . . I must have saffron, to colour the warden pies; mace; dates,—none! That’s out of my note. Nutmegs, seven; a race or two of ginger,—but that I may beg; four pounds of prunes, and as many of raisins o’ the sun.”

There is a good description of a modern sheep-shearing feast among the poems of Clare, whence we learn that the fanciful arguments in the Third Scene of the Fourth Act of “*The Winter’s Tale*” are not altogether unlike the things intended to be said on such an occasion. But festivals so gracefully conducted are uncommon, through the want of a disguised princess to do the honours.

The old customs of clipping-time were observed by Sir Moyle Finch, at Walton, near Wetherby, in the time of Charles the First, and are thus described by Henry Best:—

“Hee hath usually fower severall keepinges shorne altogether in the Hall-garth. . . . He hath had 49 clippers all at once, and their wage is, to each man 12*d.* a day, and when they have done, beere and bread and cheese; the traylers have 6*d.* a day, His tenants the graingers are tyed to come themselves, and winde the woll; they have a fatte weather and a fatte lambe killed, and a dinner provided for their paines; there will be usually three score or fower score poore folkes gatheringe up the lockes; to oversee whom standeth the steward and two or three of his friends or servants, with each of them a rodde in his hande; there are two to carry away the woll, and weigh the woll soe soone as it is wounde up, and another that setteth it downe ever as it is weighed; there is 6*d.* allowed to a piper for playing to the clippers all the day; the shepheards have each of them his bell-weather’s fleece;”\*

\* Best’s Farming Book, 21, 97.

—the “belflys” allowed to the shepherd by the old Saxon Laws of Landright.\*

In the reign of Henry the Third, the ploughmen and other officers, at East Monkton, between Warminster and Shaftesbury, were allowed a ram for a feast on the Eve of St. John the Baptist, when they used *to carry fire round the lord's cere*. This form of the Beltane superstition was observed in the north of England and in Scotland about fifty years ago. The Beltane flourishes at the uttermost ends of Europe, in the Scilly Islands, and in Russia; and even the man of Madagascar, who holds his head to other stars, is accustomed to kindle bonfires on the day which we have dedicated to St. John. We learn from the “Popular Antiquities,” that, not long ago, in Gloucestershire and Herefordshire, on the eve of Twelfth-day, fires used to be lit at the end of the land, in fields just sown with wheat. This seems to be the custom just now noticed as extant in Wiltshire under Henry the Third, slightly varied, and transferred from the summer to the winter solstice, or from the feast of St. John the Baptist to that of St. John the Evangelist.†

At Christmas, tenants and other dependants in many places received from the lord an allowance of firewood, called the Christmas-stock or Christmas-brand; and at this time their poultry rents and other donations were usually due: in the Hundred Rolls of Huntingdonshire, donations at Christmas

\* Sceap-hyrdes riht is thæt he hæbbe . . . 1 bel-flys—i.e. timpani vellus. (Laws of Landright.)

† Item Carucarii et alii Wykemanni debent habere i multonem et ferre ignem circa bladum domini in vigilia Nativitatis beati Johannis Baptiste. (Add. 17450, f. 215 b.)

In vigilia enim beati Johannis colligunt pueri in quibusdam regionibus ossa, et quædam alia immunda, et insimul cremant, et exinde producitur fumus in ære. Faciunt etiam brandas et circumant arva cum brandis. (Harl. 2345, f. 50. 1 Sax. in Eng. 361.)

Three Visits to Madagascar, 127.

1 Brand and Ellis, 33, 310, 337.

Die möglichkeit einer vermischung der beiden Johannes im Mittelalter, die Grimm, S. 358, andeutet, halte ich für gewiss. . . (Leo, Ortsnamen, 205.)

are called *lok* or *loksilver*. A tenant at Huntercombe, in Oxfordshire, on the feast of our Lord's Nativity, was bound to give to his lord a loaf, with a penny half-penny, a gallon and a half of ale, a cock and a hen; and then on the same day the said John and his wife, with another person—*unus alius*—whom they might choose to bring with them, were to dine with the lord. In most of the manors of Glastonbury Abbey, the bailiffs and chief tenants dined in hall on Christmas day, receiving bread and beer, meat and pottage; some of the tenants could bring their wives and a third person with them; they were required to furnish their own cups and dishes, and a napkin or table-cloth if they wished to eat from a cloth; they brought likewise a bundle of wood to cook their pottage, unless they chose to have it undressed. This entertainment was called a *Ghest*; it was to be done liberally and in good style. The tenant of a yardland at Pennard, near Glastonbury, could have at his gest or revel on Christmas day ten loaves and ten pieces of meat—five of pork and five of beef—and he could have at the same gest ten men drinking after dinner in the lord's hall.\* There was never more revelling and

\* *Debet habet Wdetale contra Natale scilicet unum truncum.* (Add. 17450, f. 39.)

Debent præterea habere ii fagos contra Natale ad ignem extraditione tantum prepositi nostri. (Add. 6159, f. 160 b.) Isti debent habere cristemessetokkes contra natale domini. (Harl. 3977, f. 110 b.) Debent predicti tres habere truncum ligneum contra natale Domini, qui Anglice dicitur Christemesse brand. (Custumale Roffense.)

De dono ad lardar' ad natale xxviii sol'. (Add. 17450, f. 27 b.) dat ad lok ad Nat' Domini iiii gallinas et unum panem prec' iiii<sup>d</sup> et prandeat cum domino. (2 H. R. 635.)

*Lác*—Ang. Sax. a gift, an offering.

cariabit boscum domini contra natale per ii dies ad cibum domini et dabit exenn' contra Natale vi panes precii iiii<sup>d</sup> et vi lagen' cervisie precii iiii<sup>d</sup> et iiii gallinas et ii gallos et veniet ad prandium pro predicto exennio sexta manu si voluerit. (2 H. R. 781.)

dabit exennium domino ad natale iiii panes albos et iiii gallones cervisie et i gallum et iiii gallinas et debet comedere cum domino ipse et tota familia sua. (785.)

debet habere Ghestum suum ad natale in curia domini ipse et uxor sua scilicet ii albos panes et ii fercula carnis et cervisiam sufficienter et honorifice et clera et debet portare secum discum et cifum et mappam et debet portare ante natale i fascem de busca ad escam suam coquendam quod si non fecerit habebit olera sua cruda. (Add. 17450, f. 39, 45 b.) debet ipse

confusion in an ancient hall than at Christmas. Let us fancy the noise, and the smoke and steam :—cooks dressing meat as though they were mad ; hounds lapping blood and fighting for bones ; men and women crowding, laughing, squabbling, talking all at once ; lords and ladies gazing at the scene from the upper part of the hall ; no wonder that they grew tired of it in time, and were glad to keep Christmas in their withdrawing rooms.\*

The “waits,” who disturb our slumbers at Christmas, are the successors of certain old watchmen, who were bound by their tenure to keep watch in the lord’s hall from Christmas until Twelfth-day. In the middle of the thirteenth century, a tenant at Winterborne was bound, with another of the same tenure, to watch the lord’s court by night, whenever and as long as it should please the lord or the bailiff, and on the morrow was allowed a dishful of wheat. In one of the manors of St. Paul’s Cathedral, a tenant was appointed to watch at the court from Christmas to Twelfth-day, to keep a good fire in the hall, and he received a white loaf, a cooked dish, and a gallon of ale. Sums paid on account of Yule-waiting are entered three or four times in Boldon-Book.†

et uxor sua et garcio suus habere ghestum . . . debet habere ghestum ad natale se tercio. (f. 46 b.) Franciscus de Pennard tenet i virg’ et i ferling’ . . . et debet habere gestum suum ad natale scilicet x panes et x frustra carnis scilicet v de porco et v de bove et debet habere ad idem gestum x homines bibentes post prandium in curia domini. (f. 57.)

\* Dreary is the hall eche day in the weke,  
Ther the lord ne the lady liketh noght to sitte ;  
Now hath ech riche a rule to eten by himselve  
In a privee parlour, for povere mennes sake,  
Or in a chamber with a chymenee, and leve the chief halle  
That was made for meles, men to eten inne,  
And al to spare to spende that spille shal another—

And all from motives of economy, to save wealth that some one will be sure to scatter.

† Et si dominus voluerit vel ballivus debet ipse et alius de eadem tenura vigilando custodire curiam domini de nocte quando et quocienscunque dominus vel ballivus voluerit si necesse fuerit. Et in crastino habebit unum discum plenum de frumento. (Add. 17450, f. 180 b.)

Dom. S. P. lxxiii. vigilabit circa Curiam Domini una nocte Nath’ ad cibum Domini. (34.)

In Hevedlega habet abbas iii Coterias . . . Isti debent vigilare in Curia Domini cum presens fuerit. (Tindall’s Evesham, 59.)



Christmas waits are not to be confounded with ward-men, whose duty of ward-keeping was also connected with their tenure. The wardmen were a kind of rural police. They were probably maintained on the north side of London until the institution of a general system of police in the time of Edward the First. By the Statute of Winton it was ordered that a watch should be kept by six men at each gate of a city, by twelve men in every borough, and by six men or four men in each rural township every night from the Feast of the Ascension of our Lord to the Feast of St. Nicholas. The watchmen could detain any one unknown to them; any one who would not stand and declare himself, was pursued with hue and cry—with horn and voice—

Swarming at his back the country cried.

We suppose that St. Nicholas became the patron of highwaymen, because the watch was intermitted on the day dedicated to St. Nicholas. The wardmen are occasionally noticed in the Domesday of St. Paul's. The survey of 1279 states, that at Sutton, in Middlesex, each tenant who had cattle on the lord's lands to the value of thirty pence, paid a penny at Martinmas, called wardpenny; but this tax was not due from the watchmen of the ward, who waited at night in the king's highway, and received the ward-staff—

They wared and they waked,  
And the Ward so kept,  
That the King was harmless,  
And the country scatheless—

In Essex the wardkeepers had a rope with a bell, or more than one bell, attached to it: the rope may have been used to stop the way. The wardstaff was a type of authority, cut and carried with peculiar ceremony, and treated with great reverence.\*

Sexdecim predicti villani redd' xvi sol' de Michilmeth et vi sol' de Yolwaytyng. (Boldon-Book.)

\* Quolibet habens averia super terruras Domini ad valentiam xxx<sup>s</sup> dabit

At Chingford the wardstaff was presented in court in Hock-day. This day—the second Tuesday after Easter—was another very important day in bygone times. John Ross of Warwick records, that on the death of Hardicanute, England was delivered from Danish servitude, and to commemorate this deliverance, on the day commonly called Hocktuesday, the people of the villages are accustomed to pull in parties at each end of a rope, and to indulge in other jokes.\* The Hock-tide sports were kept up at Hexton in Hertfordshire in the time of Elizabeth, and are described in Clutterbuck's Hertfordshire. We notice this account of them, because it has not been noticed in the "Popular Antiquities." Hockday was usually set apart for a love-day, law-day, or court-leet. This court could be held but twice in the year, and was generally held at Hocktide and Michaelmas, or Martinmas, since a court on these days would not interfere much with agricultural operations. The leets, like most other gatherings, ended with good cheer. In the thirteenth century, when the officers of East Monkton attended the Hundred courts at Deverell—which were held at Hocktide and Martinmas—they were allowed a loaf and a piece of meat each.† A feast following a court-leet or law-day, was

unum denarium ad festum Sancti Martini, qui vocatur Wardpeny, exceptis illis qui sunt de Ward vigilantes, qui vigilant ad regiam stratam de nocte . . . et recipient Wardestof. (Dom. S. P. lxx.)

Middleton, Camb.] Memorandum quod omnes isti prenominati tam liberi quam villani qui habent bestias pretii xxx dant domino predicto per annum i<sup>o</sup> pro quadam consuetudine que vocatur Wartpenny. (2 Hundred Rolls, 453.)

The tale of the Ward-staff is in Palgrave's English Commonwealth; or in Blount's Fragmenta Antiquitatis, 325—332, and there is an edition of it by the late Mr. Singer in Notes and Queries.

\* Hardeknuts mortuo, liberata est Anglia ex tunc a servitute Danorum. In cujus signum usque hodie, illa die, vulgariter dicta Hoxtuisday, ludunt in villis trahendo cordas partialiter, cum aliis jociis.

There are allusions to this diversion in the Iliad—

Τῷ δ' ἔριδος κρατερῆς καὶ ὁμοίου πολέμοιο  
πείραρ, ἐπαλλαξάντες, ἐπ' ἀμφοτέροισι γάνυσσαν.

While they of sturdy strife and of fair battle gain'd  
Alternately the tug, and still between them strain'd.—(xiii. 358.)

† Item Wykemanni debent comedere apud Deverel die beati Martini quando veniunt ad hundred' et quilibet eorum habebit panem et unam

called a leet-ale or scot-ale. An ale is said to mean no more than a feast. There were leet-ales and scot-ales, church-ales, clerk-ales, bid-ales, and bride-ales. Scot-ales were often abused, and made means of extortion. The bishops, the judges, and all the king's men tried in vain to suppress them.\* All persons present at a scotale paid *scot*, that is a fine, or fee: the money raised nominally furnished a feast, but was really for the benefit of the chief officer of the court—the portreeve, headborough, or thirdborough. In some places the leet-ale was not entirely supported by subscription. In Tollard, on the edge of Cranborne Chace, the steward was allowed on the law-day to have a course at a deer out of Tollard Park.\* At Bovey Tracey the portreeve has the profits of a piece of ground, called Portreeve's Park, to defray the expenses of the annual revel. The Glastonbury Rental describes the mode of keeping the scotales at the Deverells, in Wiltshire, during the time of Abbot Michael, who governed Glastonbury between the years 1235 and 1252:—

All the men of Longbridge and Monkton declare that the lord can make three scotales in the year at Longbridge; and

peciam carnis in Vigilia Natalis Domini. Eodem modo habere debent ad hocke. Et ad pasch' quilibet eorum habere debet i panem et v ova et ad hund' de hockeday comedere ut supra. (Add. 17450, f. 215 b.)

\* Chingesford . . . faciebat suitam hundredi de Waltham cum preposito et duobus hominibus, et veniebant homines ejusdem tenementi ad scotallam prepositi. (Dom. S. P. 144, also lxx.)

De parvis ballivis qui faciunt cervisias quas quandoque vocant Scotalas, quandoque fulstales, ut extorqueant pecuniã a sequentibus hundredum et eorum subditis; et de aliis qui cervisiam non faciunt garbas in autumnò colligentibus, et bladum pauperum indebite distrahentibus. (Burton Annals, Gale 339.)

Charta Forestæ VII. Letters of Peter de Blois. Quart. Rev. No. cxvi. Horne's Mirrour, 35, Ed. 1768.

† In March 1618, Joseph Compton, of Yeovil, deposed that . . . during the tyme he was deputie Ranger of Cranborne Chase, he had been once or twice present at a Court Leete holden for the Manor of Tollard, which court was holden yearly at or near a place called Lavermere Gate, lying near to the way that divides Dorsetshire and Wiltshire, and adjoyning to Tollard park; and the Steward of the said Court at the Court soe holden did challenge a Custome to have a Course at a deare out of Tollard parke . . . It was called the Tollard Lawday Course. (*Original Deposition.*)

all the married men and bachelors claim to come on the Saturday after dinner, and to drink as at cunninghale, and to be helped thrice to drink; and on Sunday the bridegroom and the bride shall come with their penny, and likewise on Monday; and the bachelors shall come on Sunday with a halfpenny, and on Monday they claim to come and to drink freely without payment, as long as they drink standing; if they sit down they must pay.\*

Cunninghale was probably the name of a Guild, or festive association. The customs above described are very like the customs of ancient Guilds. By the rules of the Guild of the Holy Ghost at Abingdon (dissolved in 1547) members who sat down at dinner paid one rate, and members who stood for want of room paid another. There is a good account of the village wakes of the seventeenth century in a report addressed to Archbishop Laud by Pierce, bishop of Bath and Wells. But we cannot undertake to be chroniclers of all kinds of revelry. We have been obliged to notice Christmas-dinners and Scot-ales, because they used to be incidents of tenure.

\* Omnes homines de longponte et munketun' dicunt quod dominus potest facere tres scotallas per annum in longo ponte et presunt omnes sponsi et juvenes venire die sabbati post prandium et potare sicut ad cunninghale et habebunt ter ad potandum et die dominica sponsus et sponsa venient cum denario suo et die lune similiter. Juvenes vero venient die dominica cum obolo et die lune presunt venire et potare libere sine argento, ita quod non sunt inventi sedentes super scamnum, et si inventi fuerunt dabunt argentum sicut ceteri. (Add. 17450, f. 66.)

Damerham] Item potabit iii scotalles scilicet unam ante festum Sancti Michaelis per ii dies cum uxore sua et dabit iii<sup>d</sup> et si habet famulum vel famulam et undersetles quilibet dabit ob' et potabunt per unum diem. Item potabit ii scotall' post festum S. Michaelis et dabit ad unam pro se et uxore sua ii<sup>d</sup> ob' et ad alteram ii<sup>d</sup> et potabit per ii dies et si famulus vel famula vel undersetles venerint quisque dabit ob' per diem et si extraneus venerit dabit ob'. (f. 50.)

Lothers, near Bridport, a<sup>o</sup> 1305] si fuerit uxoratus capiet iii lagenas cervisie vel seisare de scotallo domini, et reddet pro eis ii denarios et obolum. (Delisle, Classe Agricole en Normandie, 87.)

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### ART. III. — OUR METROPOLITAN LOCAL TRIBUNALS.

*By* ALEXANDER PULLING, Esq.

THE absence of system which is characteristic of the local government of London, we can observe in the constitution of its local tribunals. The numerous Courts for the administration of justice, both in civil and criminal cases within the metropolitan area, like the municipal institutions which in former times were so freely called into existence under royal charters or special Acts of the Legislature, have their origin in a succession of patchwork attempts specially to provide for each supposed occasion during the progress of London from a walled town, covering about 700 acres, with a population half mercantile, half military, living in a labyrinth of courts and alleys, the majority being, as appears from an old proclamation, "*heaped up together, and in a sort, half smothered,*" to the majestic city of our day ; spreading over more than 120 square miles,\* and containing two thousand six hundred miles of streets, flanked by three hundred and sixty thousand inhabited houses, with a population of three millions, and an assessed annual rental of £13,000,000.

Modern London embraces important portions of the four adjacent counties, and has swallowed up not only the old district which is still designated "*the City,*" and its ancient suburbs, but numberless places formerly existing as distinct towns, villages, and hamlets, which in days gone by had their separate systems of local government. The various tribunals which then served for the administration of civil and criminal justice throughout the large but unevenly peopled area so par-

\* The whole area of the Metropolitan Police District is about 700 square miles.

celled out, for the most part remain, under an entirely altered state of things; and divide the jurisdiction with Courts founded on an entirely different principle, adapted perhaps to the occasion that called them into existence, but equally unsuited to the exigencies of the present day.

Our metropolitan city, from which the stream of justice flows throughout the realm, has for the purposes of judicial administration within its own area, a disadvantage in some respects compared with many other districts, and is certainly without the advantages which its own resources naturally suggest. All the superior Courts are held in London, and there is no lack of Judges and Magistrates to perform all that is required on their part, without the aid of *dilettante* dispensers of justice; and the figures already given suffice to show that within the metropolitan area we could, if necessary, have the attendance every day in the year of sufficient persons, qualified for every grade of Jurymen, to meet every requirement; and at the same time limit the obligation of each individual's attendance to once in three years: and yet under the existing practice there is a sort of scramble connected with the whole machinery of our Courts; and whilst not without reason Judges and Jurymen are continually complaining of being put to inconvenience, there is a very considerable waste of available resources, causing most unnecessary and vexatious delay, inconvenience, and expense to the suitor.

Our chief metropolitan tribunals are at this day held in the same place, and with hardly better accommodation, than was accorded to them at the date of Magna Charta, when the Common Pleas was permanently fixed at Westminster Hall.

The demand for a fitting *Palace of Justice* for the metropolis has now been so long and so urgently pressed on the attention of the Legislature, that we may shortly expect to have an appropriate building provided, with ample accommodation for the holding of all our metropolitan tribunals; and with the concentration of the Courts themselves, there can be little

difficulty in so arranging for the conduct of their proceedings that the numerous inconveniences now felt by our Judges and Jurymen, the suitors and witnesses, and by both branches of the legal profession, may be got rid of.

Under the present regulations affecting the administration of justice in London, the area and districts of the metropolis greatly vary for different purposes. The Central Criminal Court district extends over an area of more than 700 square miles, including all Middlesex, and parts of Surrey, Kent, Essex, and Hertfordshire. The Bankruptcy Court district extends much further, including all places not within any of the appointed country districts, so that it at present includes the county of Northampton; whilst for the purpose of *Nisi Prius* business the metropolis is subdivided into the "City" and the four districts formed by the adjacent counties; and for the purposes of the inferior courts, both civil and criminal, London is again arbitrarily divided into a number of districts of various areas, no one set of which agrees with another. Thus there are for the purposes of the County Court jurisdiction eight metropolitan districts, exclusive of the "City." There are eleven metropolitan Police Court districts, besides the "City;" and that ancient and privileged portion of the metropolis constitutes for most purposes a separate district, and, indeed, for all judicial purposes, instead of being treated as a portion of the metropolis, may be deemed altogether distinct from it.

With regard to the civil business, we have, at the present time, Courts of *Nisi Prius* held in Westminster Hall in and after every term by Judges of the Court of Queen's Bench for the County of Middlesex, and other *Nisi Prius* Courts for the same purpose by Common Pleas Judges and Barons of the Exchequer respectively; and immediately after the termination of the Middlesex sittings there are sittings also of each of the Courts at Guildhall, for the City of London. And we have also in a great degree, for the trial of Metropolitan cases, the Assizes held at Croydon or Kingston, Maidstone and Chelmsford, under



the Commissions of Nisi Prius, issued every spring and autumn.

In ancient times all issues in actions brought in the Superior Courts in the County of Middlesex were tried in Term, before the full Court, and were really *trials at bar*; and to remedy the inconvenience caused by this, as Middlesex came to include parts of the metropolis, it was provided, three centuries ago (18 Eliz. c. 12), that the two Chief Justices and Chief Baron should hold Nisi Prius sittings for their several Courts either during Term or the four days after. The Nisi Prius sittings for the City of London seem to have been held at Guildhall or St. Martin's-le-Grand, or some other place within the City, from a very early period, in compliance with an ancient civic privilege, that the citizens should not be required to plead in any case out of the bounds of the City.

Various statutes have from time to time extended the power of the Judges of Westminster Hall with regard to the Nisi Prius sittings for London and Middlesex. The 18 Eliz. c. 12 enabled two of the puisne Judges of any of the Courts to sit in lieu of the Chief. The 12 Geo. I. c. 31, extended the time of the sittings after Term to eight days, and the 24 Geo. II. c. 18, to fourteen; and the Common Law Procedure Act, 1854, enables any one of the Judges of the Superior Courts to sit at Nisi Prius for either of the three Courts; but it is not usual for any of the Judges at these sittings to try cases, except arising in his own Court. With the exception of Crown Office cases, which are always tried in the Court of Queen's Bench, and Revenue cases, which properly belong to the Court of Exchequer, the cases tried at these Nisi Prius sittings of the three Superior Courts are of the same character, and the only recognised classification is that into Special Jury Cases and Common Jury Cases.

The Nisi Prius sittings of London and Middlesex are under the present system held at stated times, fixed by the Judges, there being usually sixteen separate sittings for Middlesex, and

twelve for London ; in all twenty-eight distinct sittings, occupying about 130 days in the year. For the purpose of a *Nisi Prius* trial in London or Middlesex, notice of trial must be given for the first day of one of the twenty-eight appointed sittings. There may be no prospect of an actual trial at the sittings for which notice is given ; but if the suitor does not give ten days' notice before the first day of the sittings, he is too late. There is always, therefore, a sort of scramble to be in time for the most important sittings, those held after Term. A variety of circumstances generally concur to bring into the cause list for London and Middlesex a number of cases which are in no way connected with the metropolis ; and whilst the civil business of most of the circuits is decreasing, so that in some counties not half a dozen cases are entered for trial at the assizes in the year, the *Nisi Prius* business at Westminster and Guildhall exceeds that of all the circuits taken together, and almost every list necessarily contains a large number of *remanets* from the previous sittings.

Whatever may be said for or against country suitors being allowed to try their cases in London, it is clear that the formal regulations as to *Nisi Prius* business at Westminster and Guildhall do not give the London suitor the advantages he ought to possess. Again, the metropolis, for the purpose of the County Courts, is divided into eight districts ; but the exemption claimed by the "City" from the operation of this General Act, has had the effect of keeping up several courts within the privileged district. Thus there is the Lord Mayor's Court, presided over by the Recorder, with an unlimited jurisdiction, both legal and equitable, for cases which are within the City boundaries, and peculiar modes of procedure, in part derived from the ancient customs of the City of London, and in part from recent Acts of Parliament, and possessing the very peculiar power of proceeding by what is called *foreign attachment*.

There is also a Small Debts Court for the "City," in part de-

rived out of the two ancient Sheriffs' Courts, the jurisdiction being defined by a succession of local and personal Acts passed from time to time at the instance of the Corporation of London, with a view to graft on their older tribunal the improvements in procedure, &c., established throughout the country by the General County Courts Acts, in lieu of permitting the general provisions of the County Courts Acts to avail within the "City." That the result of all this is, with regard to the recovery of debts, &c., under £50 within the "City," has been to create great confusion and injustice, is only what was to be expected.

By ancient custom of the City of London there is a Court of Hustings and a Court belonging to each of the Sheriffs' *Compter*, with a peculiar civil jurisdiction; but this jurisdiction is, by virtue of the recent local statutes which have been already referred to, now in abeyance. The Lord Mayor of London is by ancient custom said to have a peculiar civil jurisdiction over disputes between citizen and citizen, sitting as a Court of Conscience. The Court of Aldermen have a jurisdiction over disputes between broker and principal, and also an ancient jurisdiction over questions affecting the estates of citizens' orphans; but this jurisdiction is now in a great degree gone into disuse.

These ancient Courts of the City of London are very fully described in the reports, &c., of the Royal Commissioners appointed, in 1853, to inquire into the constitution, &c., of the Corporation of London, and the Select Committee of the House of Commons in 1861, on "the Government and Taxation of the Metropolis;" and to those reports, and the printed minutes of evidence in the Appendix, the reader is referred for more detailed information on the subject.\*

\* Report of H.M.'s Commissioners appointed to inquire into the Constitution of the Corporation of London, &c., 1853, Minutes of Evidence, pp. 181—192; and Report of the Committee of the House of Commons on the Government and Taxation of the Metropolis, Minutes of Evidence, pp. 170—179. The Courts of the City of London are also described in the author's work on the Laws and Customs of the City of London, ch. xiii.

There were formerly other local Courts in the metropolis outside the privileged boundary of the "City:" the various Courts of Request, and the celebrated *Palace Court*, with a jurisdiction in some respects resembling the Lord Mayor's Court, and, like that Court, under its original constitution, having only a limited number of privileged counsel and attorneys. The old Courts of Request were swept away by the County Courts Acts. The Palace Court survived, and owed its subsequent downfall to the accident of an energetic writer for the public press having been sued there, and in consequence brought about a clamour for its abatement as a nuisance. There remain, therefore, only among the inferior Courts of civil jurisdiction within the metropolis whose powers conflict with the County Courts, the Courts of the "City," already referred to, and a Court connected with the "City," in Southwark, called the "Borough Court of Record." \*

The criminal jurisdiction within the metropolis is divided among a number of Courts. Of these, the Central Criminal Court deserves the first mention. Its jurisdiction extends to all places within ten miles of St. Paul's, including not only London and Middlesex, but parts of Hertfordshire, Kent, Essex, and Surrey, and is usually held once a month, its sittings extending to six or seven days. In its origin this Court was but the Court of Oyer and Terminer for the City of London, and of the delivery of the gaol of Newgate of prisoners taken there by the civic authorities. Parliament was induced in 1834 to give this Court the very extensive jurisdiction it now enjoys; and the judicial staff is a very efficient one, consisting of two of the Judges of Westminster Hall, the Recorder and Common Serjeant of London, and the Judge of the City Sheriffs' Court; but the Lord Mayor and Aldermen of the City are part of the legal constitution of the Court, and though these gentlemen rarely take any part in the actual proceedings

\* This Court has very little business. It is held before an officer of the Corporation of London, called the Steward of Southwark.

at the trials, delay and inconvenience is sometimes occasioned by their non-attendance, as their presence is generally essential to form a Court.

Though the metropolis has thus the advantage of a Central Criminal Court, yet the jurisdiction of this tribunal is divided with the various Courts of Assize and Quarter Sessions for those counties, and for the Cities of London and Westminster, Borough of Southwark, and Tower of London. It is true some of these Courts are fallen into desuetude, but the Surrey and Middlesex Sessions take a host of cases which could with much more advantage to the public be taken at the Central Criminal Court. Under the present arrangements there is occasionally an advantage on the part of a lucky thief in getting off in the scramble, by the engagement of the police in another Court; but to all others concerned—the jury, witnesses, and professional men—the inconvenience of having several Courts sitting in different places for the same purpose is an unmitigated evil.

As already observed, there are in the metropolis eleven Police Courts, and by virtue of the Summary Jurisdiction Acts these Courts possess a very important jurisdiction. The presiding officers are Magistrates, whose qualification is prescribed by the Legislature. Such Courts were first established in the metropolis seventy years ago by Mr. Pitt, as a remedy for the evils formerly practised by Justices of the Peace in London. The Metropolitan Police Courts, as they are now constituted, were established by the Act 3 & 4 Vict., c. 84, which authorises the appointment of twenty-seven Police Magistrates,\* but omits the “City,” and within this excepted portion of the metropolis, the powers and duties of Police Magistrates still belong to the Aldermen.

\* At present only twenty-three Police Magistrates have been appointed for the Metropolis. The Act extends only to the *Metropolitan Police District*, and the “City” is not within this. The abolition of a separate system of police and Police Magistrates within the “City” has been repeatedly recommended to Parliament; but the Corporation hitherto have had influence enough to defeat this very desirable reformation.

The other business belonging to the office of honorary Magistrates, but which does not come within the jurisdiction of the Police Courts, is transacted throughout the metropolis in Petty Sessions, according to the districts in which it occurs, by the various Justices of the Peace for the "City," and the counties of Middlesex, Surrey, Kent, or Essex.

In London, of all places in the world, waste of time is the waste which is most felt. In the multiplicity of our present metropolitan tribunals, and the want of system in the order and distribution of the business we have at present, notwithstanding the ample supply of Judges, Magistrates, and Jurymen of every class, delays and consequent expenses in the procedure both of civil and criminal cases which might be easily saved, to the advantage of all concerned.

In the first place, why should there not be one *Nisi Prius* Court for the whole metropolitan area, to which could be sent the records from all the Courts entered for trial in London? If this Court were sitting continuously, with the interval only of the Long Vacation, and a proper arrangement were made of the causes entered, so as to ensure a proper order of trial, it would require but two of the Judges at the utmost to dispose of the whole *Nisi Prius* business—and, indeed, for a greater portion of the time, the services of one Judge would be sufficient.

At the time of entering any cause for trial at this Metropolitan *Nisi Prius* Court, a certificate might be required so as to guide the officer in arranging the list: and separate lists might be most advantageously made of the causes so entered, 1st, Cases certified to be short and undefended. 2ndly, Cases agreed to be tried by the Judge without a Jury, or when the facts were undisputed. 3rdly, Revenue Cases. 4thly, Mercantile Cases to be tried by a jury of merchants. 5thly, ordinary Common Jury cases. 6thly, Special Jury cases. 7thly, such cases as were not certified to be *London* cases. By postponing the last class of cases till after those properly belonging to the metropolis were disposed of, a very great abuse

of the present system of *Nisi Prius* trials in London would be got rid of, and the other suggestions as to the classification of the cases would, with the aid of some amendments in the Jury regulations, cause a very great improvement in our *Nisi Prius* trials, which at present are often a mere scramble, and as unsatisfactory as they are costly. These improvements could be more effectually carried out by causes being always entered and notice of trial given for ten days after the date of such notice, whenever that might expire.

In like manner, with regard to the Criminal and Quarter Sessions Courts within the metropolitan area, the substitution of one Court could be most advantageously made. If, in lieu of the monthly Sessions of the Central Criminal Court and the sittings of the various Metropolitan Sessions, there were one continuous Metropolitan Sessions always sitting (with the interval of a short vacation) and the business of the Court so arranged as to take the cases in a certain order, according to their character and importance, the whole Criminal and Sessions business of the metropolis would be disposed of with the greatest facility, and with the greatest advantage to the community. The Judges from Westminster Hall need not be required to attend more frequently than they do at present; the staff of other Metropolitan Judges, including the Recorder, Common Serjeant, Judges of the Middlesex Sessions, &c., would suffice to dispose of the whole Sessions business of the metropolis in respect of the trials of criminals and the hearing of appeals; and there are the Metropolitan Police Magistrates, whose names could be placed in the Commission with more advantage to the public than those of the Aldermen of the "City," who very properly at present are allowed to take no part in the business of criminal trials, though obliged to attend in their places.

One of the most important consequences of such a consolidation of our Metropolitan Tribunals would be the relief of those who have to serve on Juries. The present regulations affecting Jurymen in the metropolis are most unsatisfactory. Among the



360,000 householders in the metropolis, we have such a staff of qualified Jurymen of every grade as would, under a proper system of regulations, render it unnecessary for any individual to serve for more than one week every five years, and at the same time give a most complete supply for all the requisites of justice. Why could not the names returned as Jurymen within the metropolitan area be classified into lists,—1st, of Common Jurymen; 2nd, of Merchants; 3rd of Special Jurymen; 4th, of Grand Jurymen; such lists to be annually revised by the Revising Barristers, and no name to be entered on more than one list. By such a regulation, we should always have a constant supply of every class of Jurymen, without imposing on them any of the hardships so loudly complained of. At the present time, a tradesman in Oxford Street, with a counting-house in the "City," and a country residence at Clapham, may be called on to serve in half a dozen different places, in one case as a Common Jurymen, and in others as a Special Jurymen or Grand Jurymen. Were the demands on the time of Jurymen so reduced, the regulations for enforcing their attendance might be made more stringent, and the public time would not so often be wasted, and the expenses of litigation enhanced by causes going off *pro defectu Juratorum*.

With regard to the Grand Jury within the metropolis, it has long been an expressed opinion on the part of all persons competent to judge, that in cases already investigated by qualified Police Magistrates,\* their interference is worse than useless. Hardly any change in the procedure of our criminal courts would be more conducive to order in the trials than such a dispensation with the services of the Grand Jury. The cases could thus be always reduced into lists, and taken in their order, to the great convenience and advantage of every one concerned, and the furtherance of the course of justice. The

\* On the last discussion on this subject in Parliament, the principal objection to the dispensation of the services of the Grand Jury, in cases sent for trial by the Metropolitan Magistrates, was, that some of those cases were sent by the City Aldermen.

gentlemen who form the Grand Juries of the metropolis, relieved from such useless labour, might be well employed in inquiring into the numberless abuses which are always growing up in a great city, and by preventing such abuses, and seeing the law enforced, they would be really aiding, instead of obstructing the cause of justice. If this labour in every district of the metropolis were entrusted to a certain number of persons on the Grand Jury list, many of those evils which we have so much to deplore, would soon be got rid of. Not only might the Grand Jury be usefully employed in presenting as nuisances the abodes of crime and the dens of infamy which are so numerous in the metropolis, but in seeing that the law was generally enforced, and that the police and other public officers did their duty.

Such functions of those who now act as Grand Jurymen, with the functions also now possessed by the honorary justices with regard to the expenditure of the county rates within the metropolitan area, and the management of the metropolitan prisons and lunatic asylums, would be far more appropriate and beneficial to the public, than any duties now performed in the Grand Jury room, or at Petty Sessions, or at Quarter Sessions, or by the City Aldermen, as Criminal Judges, or Police Magistrates.

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## ART. IV. — THE MARRIAGE LAWS OF THE UNITED KINGDOM.

*The Report of the Special Committee of the Society for Promoting the Amendment of the Law, read and received at a General Meeting of the Society, held on Monday, 19th Jan., 1863.*

**A**T a meeting of this society, held on the 29th of January, 1862, an address was delivered by Mr. Hastings, on the "Marriage Laws of the United Kingdom." At the conclusion of the discussion on that address, a committee was appointed to consider the subject to which it related. The committee have now to report as follows:—

The contract of marriage which, except in the interchange of mutual consent, differs widely from every other contract, is at the present day governed by separate rules and attended by dissimilar results in England, Ireland, and Scotland.

Your committee have sought to investigate the nature of this difference and the sources from which it has arisen.

The conclusions at which they have arrived, in reference to the Marriage Laws of the three countries, are as follows:—

1. In considering the English Marriage Law, your committee have decided to distinguish carefully between the conditions which were necessary in order to make the contract binding on the parties themselves, and those which were required in order that the civil consequences of marriage might follow. The test to be applied in the one case is—Would either party be indictable for bigamy on his or her marrying again during the lifetime of the other? The tests to be applied in the other case are—Is the woman entitled to dower on the death of the man? Are the issue legitimate and capable of inheriting as such? and so forth. At the present day a marriage which is good for one purpose is equally good for the

other; but up to the year 1753 the two kinds of tests were not necessarily satisfied together.

The clandestine consensual marriages which the Act of George II. did away with, whatever might have been their operation on the parties themselves, appear to your committee to have laboured under the following disadvantages:—

1. They did not confer any right of dower on the wife, for dower was originally a matter of contract rather than a common law right, and could only arise when assigned at the church door, or, in other words, when the celebration of the marriage was *in facie ecclesiæ*.

2. They conferred no rights on the husband in the property of his wife, and so far resembled the later marriage of the Romans, viz., the *Usus*, with trinoctial absence.

3. The issue of such marriages was not legitimate.

4. They imposed on the woman none of the incapacities of coverture, so that the parties might enfeoff one another, and the woman retain her capacity of making a will. These propositions have never been disputed, even by those who have insisted most strongly on the validity of the contract *as a marriage between the parties*, and they are confirmed by a great variety of authorities. The mere contract *per verba de presenti* was unattended by a single incident connected with the rights of property or the capacity to inherit.

The inconvenience of a law which allowed marriage to be good for one purpose, and bad for another, is too obvious for comment. It admitted a sort of intermediate status closely resembling the morganatic marriages of the European continent. The man and woman were recognised as husband and wife, but the legal rights or disabilities which belong to the married state were wanting.

The changes which the Act of the 26 Geo. II., c. 33, introduced into the marriage law of England were as beneficial as they were extensive. It took away from the ecclesiastical courts the power of enforcing contracts of marriage, and re-

quired all marriages to be solemnized in the church in the presence of two witnesses, besides the minister. It secured the deliberation of the parties by interposing a period of three "holidays" between the first notice to the minister and the celebration of the marriage. To these desirable ingredients it added two more borrowed from the provisions of the canon law, viz. :—

1. *Publicity*, by requiring three publications of banns "in an audible manner in the parish church."

2. *An accessible record*, by registration in a book, "to be deemed parish property, and to be carefully kept and preserved for the public use."

Persons who desired to avoid the publishing of banns, were allowed as before to obtain a licence from the archbishop or ordinary, and all marriages solemnized otherwise than after banns or licence were declared to be null and void. But a great desideratum in the law of marriage still remained to be supplied. Except during the short period of the administration of Cromwell, no provisions whatever had been made for securing the civil consequences of marriage without invoking the aid of a minister of the Established Church. The privilege of entering on the estate of matrimony, otherwise than through the door of the Church of England, was accorded to the non-conforming section of the community in 1836, by the 6 & 7 Will. IV., c. 85, which left the parties at liberty either to contract in the registrar's office, in the presence of the registrar, after a public notice of not less than three weeks, or to be married according to the rites of their particular sect, after a similar notice to the registrar, "in a properly registered building." In both cases ample provision is made for securing publicity of the marriage at the time of celebration, and also an accessible record of the fact for future reference.

With these various salutary changes in view, it appears to your committee that, so far as the great bulk of the people is concerned, little or nothing is required in the way of amend-

ment in the English Marriage Law. But the Marriage Acts of 1753 and 1823 are not applicable to the entire community. Two important classes—the Jews and the Quakers—are expressly excluded from their operation, and, indeed, it is not absolutely certain whether previously to the 6 & 7 Will. IV., c. 85, marriages celebrated according to Jewish or Quaker usage had any legal validity. The question is, however, set at rest for the future by the express words of the Marriage Act of 1836, which renders such marriages valid if contracted *according to usage*, provided that both parties be Jews or both parties Quakers, and that notice to the registrar shall have been given, and the registrar's certificate duly obtained.

The only doubt, therefore, that can possibly exist in reference to these marriages, will arise from the necessity of complying with *established usage*. If the proper forms and rites be not observed, the same difficulty may again present itself which Sir W. Scott had to deal with in the case of *Lindo v. Belisario*, where it was held, after elaborate reference to the Jewish authorities and rabbis, that the ceremony performed did not amount to an actual marriage. The simplicity of the Quaker ceremony would probably obviate any such ambiguity in their case; but it is obvious that to make any marriage depend on the nice observance of a religious form, is not only contrary to all principle, but injurious and even unjust in practice. Where the parties are acting *bonâ fide*, and intend to enter into the marriage contract, the civil effect should not be denied to their acts because an obscure traditional ceremony had not been complied with.

Your committee have already stated that, by the second section of the Act of 1836, the marriages of Quakers and Jews were declared legal. By the 6 & 7 Will. IV., c. 86, s. 31, provision was also made for their registration; but the registering officer, whether present or not at the marriage, is required to satisfy himself that the marriage proceedings have been in conformity with the respective usages of the two com-

munities. Why should special knowledge be expected of the registrar on the subject of the Quaker and the Jewish ritual ; or how can he, even if present, know anything of the practice of a society to which he does not belong ? If, on the other hand, he is unable to “satisfy himself” on the point of conformity, why is the marriage to go unregistered, and the issue to lose the benefit of a lasting record of their legitimacy ? The source of the mischief lies in the circumstance, that the State recognises one person as alone competent to *celebrate* the marriage, and another as alone competent to *register* it. The purely civil functionary, whose duty is to record the fact, ought not to be required to judge of the completeness of a ceremonial which, *ex hypothesi*, transcends the sphere of ordinary contract. Where the marriage is celebrated according to the rites of the Established Church, the officiating minister is also the person who registers the marriage. In the case of the great body of Nonconformists, the registering officer is himself the celebrant. These two functions can never be dissociated without producing the mischievous consequence of a conflict of jurisdictions. In the single instance of Jews and Quakers this severance is permitted to take place ; and though the practical inconveniences which result are not flagrant, there is no reason why the anomaly should not be banished from the English marriage law. In the case of the established clergy, the minister is, for the purposes of registration, an officer of the State, and no other civil functionary need intervene ; in all other cases, the civil and the religious forms should be kept perfectly distinct, the State first securing the contract, and fencing it round with all necessary precautions, and then withdrawing to allow the married parties to superadd any such religious ceremony as approves itself to their consciences.

Apart, then, from the two exceptional cases which we have just noticed, the claims of the marriage law of England to become the standard marriage law of the United Kingdom, appear to rest on the following considerations :—



1. The marriage law of England recognises only one kind of marriage, which cannot be annulled at the mere will of the parties, and is attended by ulterior civil consequences.

2. By the publication of banns, the law secures time for reflection before entering into the marriage state, by interposing a period of three weeks between the revocable agreement to marry and the final indissoluble contract. This second consideration does not, however, apply to marriages celebrated by licence.

3. It requires the marriage to be public, both for the sake of greater solemnity, and in order that, if any impediment exist, it may be disclosed.

4. Where the marriage is contracted *bonâ fide*, it allows no latent impediment, which is not founded on nature and common reason, to invalidate the contract.

5. So long as one of the prescribed modes of celebration is followed, it holds the marriage to be binding without reference to the religious faith of the contracting parties.

Your committee, with this standard of a good marriage law in view, now pass to the consideration of the marriage law of Ireland.

It should not be forgotten that from the year 1172 (the date of the assimilating ordinance of the Council of Cashel) down to the accession of William III., the marriage law of Ireland was identical with that of England; and that whereas the mischiefs which formerly beset the marriage law of England were owing to the non-interference and neglect of the Legislature, those that now beset the marriage law of Ireland are due to express statutory enactments. Ireland does not, like Scotland, claim validity for any mode of contracting marriages which is not equally recognised here. She does not, for instance, sanction the mere consensual contract simply because it is binding *in foro conscientie*. Previous contracts *de presenti*, not followed by consummation, were declared insufficient to set aside a regular marriage so early as the year 1725; and

both contracts *de præsenti*, and those *de futuro copula subsequente*, ceased to form a basis for compelling ecclesiastical celebration in the year 1818, sixty-five years after the passing of Lord Hardwicke's Act. Marriages of minors are no longer invalid for want of consent of parents or guardians; the Act of 9 Geo. II., c. 11 (Irish), which made the consent essential in certain cases and under certain restrictions, having been repealed in the year 1844, by the 7 & 8 Vic., c. 80, sec. 50, commonly known as the Irish Marriage Act. Protestants of the Established Church, Jews, and Quakers, are married as in England; and the office of the registrar may, as here, be resorted to wherever it is desired to dispense with religious solemnities.

In what, then, does the variance between the laws of the two countries consist? In one word, in the series of disabling statutes which have been passed since the accession of the House of Orange. The list commences with the 9 Will. III., which not only prohibited the intermarriage of Catholic and Protestant, but rendered the celebrating priest liable to perpetual banishment. The 12 Geo. I., c. 3 (Irish), went further still, and raised the offence of celebrating such mixed marriages to the rank of a capital felony. But however terrible the penalties imposed on the celebrant, the marriage of the parties themselves had been hitherto left intact, and their issue was not bastardised. The 19 Geo. II., c. 13 (confirmed by the 32 Geo. III., c. 21), made void all marriages celebrated by popish priests where one or both of the parties professed the Protestant faith. This Act still remains in force, though many of the penalties enforced on the Roman Catholic clergy have since been swept away, and the Act of 1844 renders all celebrants of marriages not legalised thereby liable to an indictment for felony.

In a spirit similar to that of the Act of Geo. II., the Acts which rendered valid marriages solemnized by dissenting ministers, do so only in the case where *both parties are Dis-*

*sents.* Thus the legal value of the contract is made to depend on a question of religious belief, a connexion which a late celebrated trial, the final issue of which is still pending, has shown to be attended with the most dangerous consequences.

Next, how does the Irish marriage law stand in regard to publicity and registration? The Act of 1844 provided for the registration of all marriages celebrated by clergymen of the Established Church of England and Ireland, or by Presbyterian ministers, or according to the rites of the Jews and Quakers. But it made no provision for the registration of Roman Catholic marriages, as if in their case no protection was needed. Yet it has been ruled that the certificate of a Roman Catholic priest is admissible as legal evidence of the fact of marriage. Then, again, the ordinary precautions observed in England for ensuring publicity are neglected in Ireland where the parties are Roman Catholics, as these marriages may be solemnized at any hour of the day or night, and the publication of banns is not essential.

Thirdly, the marriage law of Ireland bears traces of unequal concession. The privilege of issuing licences and publishing banns was granted to the Presbyterians in 1844, but it is denied to all other Nonconforming bodies. These last must apply to the registrar for a licence or certificate, and be married, as in England, either in his office or in a certified building within the district. These privileges should either be extended to all congregationalists whose organization furnishes them with the necessary machinery, or else (and this appears to be the preferable alternative) the licensing system should be abolished altogether.

It is unnecessary to pursue the evils inherent in the present Irish marriage law into minuter detail, as the whole question has been the subject of recent public comment—they may be briefly summed up as follows:—

*L. Uncertainty in the marriages of Roman Catholics and*

Protestant Dissenters, due to the difficulty of ascertaining the religious belief of the parties.

2. *Want of publicity*, by reason of the loose mode in which purely Roman Catholic marriages are permitted to be celebrated.

3. *Want of security*, owing to the imperfect provisions for registration.

These inconveniences, so numerous and so extensive, have only recently attracted the notice of the Legislature, but, within the last few years, various attempts have been made in Parliament with a view to their removal. The guarantee of registration was endeavoured to be secured by the successive Government bills of Lord Naas and Mr. Whiteside in 1859, and of Mr. Cardwell in 1860. These measures sought to establish in Ireland a registration system for births and deaths, as well as marriages, and it was in consequence of the mutilation which Mr. Cardwell's bill received at the hands of the select committee to which it was referred, that nothing has as yet been done towards effecting the desired objects. The bill introduced into the House of Lords by the late Lord Campbell, was mainly levelled at the mischief arising from the invalidity of mixed marriages celebrated by Roman Catholic priests; and it proposed in substance, to repeal the 9 Geo. II., c. 13, so far as it rendered those marriages void. It provided further, as amended in committee, for the registration of purely Roman Catholic marriages, and it required that such marriages should be celebrated between eight A.M. and two P.M., in the presence of two or more credible witnesses.

The measure introduced into the House of Commons by Sir Hugh Cairns last session was of a more comprehensive character than any of its predecessors. It adopted the main features of Lord Campbell's bill, by giving validity to inter-marriages by Roman Catholic priests, and it proposed to confer on the Methodists the privilege of issuing licences, already conceded to the Presbyterians. But it left purely

Roman Catholic marriages on the same unsatisfactory footing as before. No publication of banns, no legal hours, no necessary interval for salutary reflection were prescribed.

Quakers and Jews were not, any more than in England, to be compelled to perform the ceremony with open doors, within defined hours, or in the presence of witnesses. The measure, in fact, as has been ingeniously said, was not so much a matrimonial code for all her Majesty's Irish subjects, as a "series of concordats with the chief religious parties, tacked on to a system of complete registration."

According to the law of Scotland, marriage is either regular or irregular. To constitute a regular marriage, the following conditions must be observed:—Publication of banns according to the rules of the Church, and celebration by a clergyman of any religious persuasion,—witnesses to whom the parties are known being usually present.

Your committee find that, according to the practice of the present day, marriage is generally celebrated in the private residence of one of the parties, at any hour of the day; but the presence of a clergyman and witnesses, together with the previous proclamation of the banns, seem to be a sufficient provision for the due publicity of the contract. The system of registration adopted appears to give satisfaction. It efficiently secures a permanent and accessible record of the marriage. Although the custom of proclaiming the banns three consecutive times on the same Sabbath, in the parish church, may afford facilities like the licence system in England, for contracting hasty marriages, your committee, nevertheless, desire to express their general approval of the law as affecting regular marriages.

On the other hand, they feel compelled to deprecate the facilities which the law of Scotland affords for contracting clandestine or irregular marriages. It is worthy of observation, that irregular marriages are, in every respect, as binding and valid in Scotland, as those which are solemnized publicly

after proclamation of banns. Irregular marriages may be contracted in three ways:—1. *Per verba de præsenti*; that is to say, by words declaratory of present mutual acceptance of the conjugal relationship. It appears “that a verbal acknowledgment—a declaration of marriage *per verba de præsenti*, may competently be proved by parol testimony. 2. That although consummation may perhaps add, in a doubtful case, to the strength of evidence as to the true intent of the parties, it is by no means an essential: a marriage constituted *de præsenti*, by mutual declarations, does not require consummation in order to become very matrimony: it does *ipso facto et ipso jure* constitute the relation of man and wife. 3. That a first marriage, although private and irregular, can in no degree be affected by a second, how regular and public soever.” (Erskine’s Institute, Book I., t. 16.)

Another mode of contracting a valid irregular marriage, is *per verba de futuro cum copula subsequente*. They are marriages consummated *conjunctione corporum*, subsequent to a previous promise to marry. Marriages of the former class are contracted finally and without condition by the very acknowledgment of the conjugal relationship; for there the *conjunctio animorum* is avowed, and that mental act of consent, according to the strict logic of the canonists, is the vinculum and essence of the contract. But a marriage contracted *per verba de futuro* is, in its inception, executory, and amounts only to a betrothal. From this promise to marry either party may resile by mutual concession; and even without such mutual discharge, either may subsequently contract a valid marriage, regular or irregular, with another; but after having exchanged the promise to marry, the effect of intercourse is to raise a legal presumption of present mutual consent, sufficient, when coupled with previous betrothal, to constitute a valid marriage.

The third class of clandestine marriages includes those where the proof of the *consensus* rests upon no express decla-

ration either *de præsenti* or *de futuro*, but upon habite and repute being proved *rebus ipsis et factis*. Proof of cohabitation, and general reputation of being husband and wife, is accepted as presumptive evidence of the *consensus*, which, in contemplation of law, is very marriage.

The statute generally known as Lord Brougham's Act (19 & 20 Vict., c. 96), making it essential to the validity of an irregular marriage, that one of the parties, at least, shall have resided in Scotland twenty-one days before the event, was a step in the right direction; but your committee are strongly of opinion that a much more comprehensive and radical reform is absolutely necessary.

The uncertainty thrown around the status of parties ostensibly married, must in the future, as it has done in the past, lead to painful litigation and disastrous consequences. Surely the best interests of a community are placed in serious danger, when the law holds forth facilities for entering upon so important a contract as marriage, even without the knowledge of the parties themselves. The fact of marriage is only a legal inference from a series of antecedent circumstances, and frequently so doubtful as to require solemn judicial investigation, to ascertain its nature. There being no registration, or public ceremony, it is obvious that fraudulent representation as to status may be successfully made, and interests of the most momentous character may thereby be placed in jeopardy.

Irregular marriages are defended on two grounds: first, as being in theory strictly logical; and secondly, as being in practice conducive to morality. What is marriage, it is asked, in the sight of Heaven, but the mutual acceptance and acknowledgment of the relationship of man and wife? The fact is complete when the interchange of consent takes place, and the law is bound upon proof of that interchange of consent, howsoever and from what sources soever derived, to recognise its binding force. The publication of banns, religious rites, and



ceremonial observances, it is said, are purely adventitious, the essence and substance being the consent of the parties. It is not disputed that consent is the very essence of the matrimonial contract. Indeed, consent is the very essence of all contracts. The question really is, whether the law ought not to insist upon certain observances as indicia and legal evidence of that consent. The provisions of the Statute of Frauds, all the strict regulations as to stamps, registration of deeds, signatures, attestation, &c. &c. prove that mere evidence of consent is not always sufficient to bring genuine and *bonâ fide* agreements under the cognizance of the municipal law. The observations of Lord Stowell upon this subject are very pertinent: "Marriage in its origin is a contract of natural law; it may exist between two individuals of different sexes although no third person existed in the world, as happened in the case of the common ancestors of mankind. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanction of religion superadded. It then becomes a religious as well as a natural and civil contract, for it is a great mistake to suppose that, because it is the one, it may not likewise be the other." (2 Hagg. Cons. Rep. 63.)

Every community has a right—nay is bound for its well-being—to impose upon individuals certain conditions and obligations. Will it be said that the courts should take judicial notice of a sale of an acre of land which is only evidenced *per verba de præsentî*? Or will it be said that a marriage settlement is of so much greater importance than the marriage itself as to require clearer proofs than that to which it is simply appurtenant?

As to the effect of clandestine marriages on morality, it is said that the dishonourable man will be deterred from practising his seductive arts by the solemn consequences which the law attaches to immorality, if preceded by promise of mar-

riage. But strangely enough it seems to be forgotten that for precisely the same reasons, the direct tendency of that law is to make female frailty the more easy victim of the designing, the dishonourable, and the immoral. It has been further urged in favour of this system, that clandestine marriages very seldom occur, the proportion being, as it has been said, about one in five hundred. But is it evident, from the very nature of these marriages, that the best calculation is little better than a good guess? To obtain any reliable estimate implies the absence of that secrecy which is their distinguishing characteristic. Those alone come to be known which litigation, family dissension, or some pressing cause, force into publicity. Again, if the proportion of irregular to regular marriages be one to five hundred—it is sound policy to throw uncertainty around the social status of the majority for the sake of extending in exceptional instances, what, for the sake of argument, might be admitted to be a merciful justice?

Lastly, this system of law has the grave fault of befriending the woman, who although wronged, has at least been accessory to her own disgrace, while it casts into irretrievable social degradation the woman whose conduct may have been throughout innocent and honourable.

The celebrated Dalrymple case may be cited as an example of the cruel results effected by this law. Miss Johanna Gordon had carried on a clandestine intercourse with Mr. Dalrymple, afterwards Lord Stair, while quartered with his regiment in Edinburgh. After exchanging pledges of love and fidelity, and almost unknown to themselves contracting what was judicially pronounced to be a legal marriage, the young cornet went abroad, and his affections towards Miss Gordon underwent a marked change. It is true, that the law bound down the unscrupulous young nobleman, and compelled him to make the best reparation to the woman he had loved, deserted, and deceived, by declaring him her husband. But Mr. Dalrymple, subsequent to the secret marriage with Miss

Gordon, won the heart and hand of Miss Julia Manners, sister to the Duchess of St. Alban's. They were publicly married : little did Miss Manners think that a deception was being practised upon her by a man who was married to another, and that the day would come when the law would break up that illusion, bastardise her children, and assign her a doubtful status in society, to be shunned if not pitied, and with little chance of ever being received into honourable wedlock. And this is not analogous to the case of bigamy, for here it was absolutely impossible for Miss Manners to have ascertained the fact of Lord Stair's previous marriage.

It has also been urged that, although the system may be in some respects bad, there are individual cases in which it is productive of unquestionable good. That admission is tantamount to giving up the argument, unless the old maxim is to be thrown aside, and the greatest good of the greatest number is no longer to be the acknowledged standard of a good law.

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## POSTSCRIPT—MR. CHISHOLM ANSTEY. THE CONVICT QUESTION.

**WE** much regret that the large encroachment on our space made by the report of the trial, *Seymour versus Butterworth*, has obliged us to postpone articles on more than one question of pressing interest. We had intended to call our readers' attention at some length to the correspondence which has taken place between Mr. Chisholm Anstey, ex-Attorney-General of Hongkong, and the Colonial Office, and to the remarkable and startling facts which it discloses. It appears that when Mr. Anstey was, in 1858, acting as Attorney-General at Hongkong, he found himself compelled by his official duty, and on information received from one of the magistrates of the colony, to prefer an indictment against a certain Daniel

Richard Caldwell, then filling the responsible post of Protector-General of Chinese in the island. The charge against Caldwell was a grave one ; it was for piratical practices, and for confederating with pirates, and notably with one Ma-chow-Wong, a worthy who is at present expiating his iniquities at Labuan, under a sentence of penal servitude. It further appears that in consequence of his taking public steps, as Attorney-General, against Caldwell, Mr. Anstey was denounced by the then Governor of Hongkong, Sir John Bowring, in the strongest terms, and was first suspended, and subsequently removed, from his office of law adviser to the Crown, and his position as Member of the Legislative Council of the colony. Happily, however, these arbitrary proceedings had not the effect which was probably anticipated and desired, that of stifling the inquiry : and an investigation having been made by the present Governor, Sir Hercules Robinson, and the Executive Council of Hongkong, it has been officially announced that the charges against Caldwell have been proved, and that he has been dismissed from the public service. It would have been imagined that the Secretary for the Colonies would have taken the earliest opportunity of expressing to Mr. Anstey the regret of Her Majesty's Government that he should have sustained so much injury and loss in return for the performance of an arduous public duty ; but we are equally grieved and surprised to find that it has been only after repeated and urgent applications by Mr. Anstey for bare justice, and after a long delay, that the Duke of Newcastle has been induced to make any acknowledgment of the services that gentleman has rendered. His Grace's long continued refusal to do justice is the more extraordinary, inasmuch as it appears from Mr. Anstey's letters that he has never sought, and does not wish for, restoration to office ; he asked only an official acknowledgment of his services ; and a contradiction to the injurious and (as is now proved) unfounded accusations made against

him by Sir John Bowring. The tardy justice of the Colonial Office is embodied in a letter to Mr. Anstey, of November 14th, and we extract the following passage:—

“I am directed to inform you, that the Duke of Newcastle is perfectly ready to express his opinion, that the truth of the charges, of which you are the principal author, brought against Mr. Caldwell, before the Commission of Inquiry of 1858, has been substantially established by the recent investigation before the Executive Council, so far as the culpability of his connexion with Ma-chow-Wong is concerned ; consequently, that it cannot now be said, in the words of the letter addressed to you by order of Governor Sir John Bowring, that ‘ none of those charges have been satisfactorily proved.’ His Grace will go further, and say, that in forcing on a public inquiry into that officer’s conduct, you did, in that respect, render a material service to Her Majesty’s Government, and the colony of Hongkong.”

We have now only space to observe that as the colonial law officers of the Crown are frequently placed in circumstances of considerable difficulty, and are charged with very onerous duties, it is absolutely necessary that they should be supported in the due execution of their functions. The treatment of Mr. Anstey affords scant encouragement to them to come forward for the exposure of corruption and complicity with crime, when practised in the high places of a colony: yet it is for such purposes, we presume, that an Attorney-General holds office. We confess our wish, in the public interest, that a “material service” had been more worthily requited.

The considerable increase of crimes of violence during the autumn and winter has led to the discussion of the whole question of secondary punishment and convict discipline. The *Edinburgh, Quarterly*, and *Westminster Reviews* contain articles thereon, and the Law Amendment and Juridical Societies, and the Society of Arts, have devoted several evenings to debates on the subject, in which, as usual, a wide diversity of opinion has prevailed. There is one point, however, on which all seem to be agreed—that the convict system of England has broken down, or is at any rate a comparative

failure. The Home Office seems to acknowledge as much by appointing a Royal Commission of Inquiry,\* which will commence its sittings in a few days, and will probably effect much good by collecting fresh information, and spreading through the public mind a spirit of calm investigation in the place of the passion and prejudice which have been hitherto too prevalent on the question. For ourselves, we are open to conviction from any quarter, and on any portion of the subject; but we are much mistaken if the result of the inquiry be not to establish two points:—the one, that transportation to a penal settlement, and on any large scale, is both inexpedient and impracticable; the other, that the adoption of the principles of the Irish Convict system would go far to remedy the evils at present complained of, and would place our penal administration in England on a rational and satisfactory basis.

\* The names of the Commissioners are given in our "Events of the Quarter." We are sorry to observe that Lord Brougham's name does not appear in the list. His lordship, if we remember right, was chairman of a select committee of the House of Lords, which, some years since, investigated the subject very fully; and he has since that time repeatedly shown his interest in all its details.

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## Notices of New Books.

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[\*.\* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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**New Commentaries on the Laws of England.** (Partly founded on Blackstone.) By Henry John Stephen, Serjeant-at-Law. Fifth Edition. Prepared for the press, by James Stephen, Esq., LL.D., Barrister-at-Law, &c. In Four Volumes. London: Butterworths. 1863.

THE fifth edition of this great work brings down its information to the present time. Mr. James Stephen is the able editor of the volumes which have permanently associated the name of his father with the history of English Law; and we doubt not that many future editions will continue to spread throughout the empire that knowledge of the principles of our jurisprudence, and our constitution, which are so well blended in the pages of these Commentaries with a mass of practical information on all the various branches of law.

**The Influence of the Mosaic Code upon Subsequent Legislation.** By J. B. Marsden, Solicitor. London: Hamilton & Adams; and Hatchards. 1862. pp. 303.

MR. MARSDEN seems to have been smitten with a desire to vindicate orthodoxy in a legal fashion. He maintains, apparently, that all the nations of the world have borrowed their jurisprudence from the Israelites, and has expended a good deal of time and labour in bringing together proofs of the identity of some of the principles or enactments of the Jewish Code with the laws of other countries, under the impression that he thus proves his thesis. We can assure Mr. Marsden that we thoroughly estimate the excellence of his purpose and the perseverance of his industry; but we cannot compliment him on having gone beneath the surface of the question, which requires far more learning, and far more intimacy with modern Biblical criticism, than he has any claim to possess.

**Letters on Transportation and the Game Laws.** By William Howitt. London: A. W. Bennett. 1863.

WE cannot pretend to praise the contents of this pamphlet. It seems to us to have been written with inadequate knowledge and



inordinate self-opinion. The game laws may be very bad, and transportation may be very good; but they will neither be written up, nor written down, by such compositions as this.

**The Highway Act, 1862. With an Introduction.** By H. A. Owston, Solicitor. London: Hamilton & Adams: Leicester: Crossley & Clarke. 1862. pp. 86.

MR. OWSTON'S little book is intended for the general public; it contains a description of the law up to the passing of the new Highway Act; an account of the reasons for the adoption of that measure; a statement of its principal provisions, its object and uses; the Act itself *in extenso*; and, finally, several appendices, containing useful information. We can say, for ourselves, that we have derived considerable advantage from Mr. Owston's labours.

**The Bleach and Dyeworks Acts, with Notes, Forms, &c.** By Henry C. Oats, Esq., Barrister-at-Law. Second Edition. V. & R. Stevens, Sons & Haynes. 1863. pp. 60.

THE "Bleach and Dyeworks Acts," by Mr. Oats, is a Second Edition, incorporating the Bleachworks Act of 1862, which came into force on the 1st of January last. It seems to contain the requisite notes and information.

**A Practical Treatise on the Law relating to Mines and Mining Companies.** By Whitton Arundell, Attorney-at-Law. London: Lockwood. 1862. pp. 226.

So far as we are able to judge by a cursory perusal, which is all that we have been able to give to the *whole* of Mr. Arundell's book, we are of opinion that he has succeeded in his task. The chapter on the rights of water and way, which we have examined with more particularity, has given us satisfaction. We apprehend that both lawyers and laymen may consult the book with advantage.

**Analysis of American Law, presented in a Chart, with Explanatory Comments.** By Joseph W. Moulton, Counsellor-at-Law. New York: John S. Voorhies. 1859.

THE title of this book explains its nature. It is an attempt to present the principles and leading features of American law in the form of a small chart, under the heads of Foundation, Superstructure, and Subdivisions. There are also sixty-eight pages of explanatory comments.

**The Legal Examiner.** Edited by Charles Henry Anderson, Solicitor. No. II. Hilary Term, 1863. V. & R. Stevens, Sons, & Haynes.

THIS little periodical deals with the education of solicitors, and is evidently earnest in its work. The first number seems to have sold

largely; the second, which is now before us, contains schemes for the education of articled clerks, some passages of which we subjoin, as we are always ready to help on any suggestion for the improvement of professional education.

“We propose that Law Classes should be established in London, and that it should be compulsory upon every Articled Clerk to attend them for the period of his Articles subsequent to the Intermediate Examination, for the purpose of being instructed in a regular course of legal knowledge. The pupil would there be told what to read, and by the aid of the careful explanation and assistance of the tutor, would have a chance of understanding what he had read.” . . .

“The classes should be under the supervision of young solicitors, who, having themselves passed with distinction, would, as in the case of tutors at the universities, be the men of all others most fitted for the post. Nor should these tutorships be mere empty titles. The payment by each pupil of a small sum per annum for his instruction would insure a very large income, which would be available for the salaries of the tutors, the creation of studentships, and other incidental expenses. In order effectually to raise the standard of legal knowledge, and at the same time to insure competent men for tutors, it will be necessary that the present final examination should have two divisions; one a simple pass examination, and the other for honours; the latter embracing not only the subjects of the former, but also additional ones, at the same time being with reference to the questions of a more searching nature; the time occupied would also be extended, and each candidate should in addition undergo a *viva voce* examination. The result of this ‘honour’ examination should be made known by a division of the successful competitors into classes in order of merit, and honorary distinctions would be conferred in proportion to the merit thus displayed, the first in merit of each term receiving a studentship tenable for three years, those below him prizes and certificates. It is from the ranks of these ‘honour men’ we would select the tutors. We also may observe that a portion of the *pass* examination should also be *viva voce*, and the total number of marks obtained by each successful candidate should be published, as is done in the case of examinations for the civil and other services.” . . .

“The Incorporated Law Society now has the control of professional education, and to them therefore application must first be made to assist in the development of this scheme. We have every reason to believe that this application would not be made in vain; should, however, the result be otherwise, it will then only remain for the profession at large, independently of the society, to take the matter in hand.”

The Student's Guide to the University of Cambridge. Cambridge: Deighton, Bell & Co. 1863.

THIS is a severely practical little book, almost every page of which contains authoritative and useful information relating to the Uni-

versity of Cambridge. The precise difficulties which perplex the freshman and expose him either to the generous condescension of his seniors or drive him with hesitating steps to consult his great oracle, the college tutor, are here anticipated and explained with excellent discrimination by men of well-tried experience. The internal economy of the colleges, the disbursements to be made throughout the curriculum, the conditions upon which scholarships, fellowships, &c., may be obtained, the qualifications which candidates for college emoluments and honours must possess, the subjects assigned for the various examinations in divinity, arts, law, medicine,—in fact, the whole information required by the undergraduate for the settlement of his plans — is given in a simple business-like manner. The book holds forth no higher pretension than that of being a reliable and intelligible guide. It consists of a series of twelve articles, contributed by different authors, each being responsible for his own. The high standing and personal experience of the contributors are quite sufficient to merit implicit confidence and respectful consideration. They write with the practical knowledge of men who have conducted the examinations which they describe and advise upon, and who have, either as students or private tutors, become familiar with the art of winning college distinction. Thus the Rev. W. M. Campion, B.D., Fellow and Tutor of Queen's College, describes the course of reading for the Mathematical Tripos. The Rev. H. Latham, M.A., Fellow and Tutor of Trinity Hall, contributes a most useful article on University Expenses; and J. K. Seely, Esq., M.A., on the Choice of a College. But we insert this notice of the *Guide to Cambridge* in the *Law Magazine* chiefly because of the paper on Law Studies and Law Degrees written by J. T. Abdy, LL.D., Regius Professor of Laws. The undergraduate who may have intention to proceed after taking his degree in arts or in law, to the Third University, would do well at the very onset to consult that chapter. It is marked by sound wisdom and excellent counsel. The comments on the Inns of Court examinations are just and impartial. We have no fault to find with the course of reading sketched out and recommended to the ambitious and high-minded student. The University of Cambridge offers not only opportunities, but valuable inducements, to prosecute the study of the law; and those who turn this to account must pass through an excellent preparation for the higher and wider rivalry of the Inns of Court. The learned professor is probably guilty of no exaggeration when he states, that "with reference to the Inns of Court examinations, both for admission to the bar and for the studentships, it is not asserting too much to say that the university student who follows out the plan of reading above sketched, and who obtains a place in the first class, ought, with the help of the lectures of the readers in London, and the technical knowledge acquired by one or two years' attendance at chambers, to look forward with certainty to a studentship in the Inns of Court."

Supplement to a Treatise on the Law of Merchant Shipping. By David Maclachlan, M.A., Barrister-at-Law. London: William Maxwell. 1862. Pp. 80.

THIS small volume forms a supplement to the well-known and highly valuable Treatise on the Law of Merchant Shipping by Mr. Maclachlan. It consists of the Merchant Shipping Act Amendment Act 1862, and the Admiralty Court 1861, edited with Notes, and with the principal cases decided in Maritime Law since October 1860. The notes are not mere jottings on the various sections, but are exponent of the principles of the enactments. We may refer, by way of example, to the valuable observations at pp. 55, 56, on the jurisdiction of the Court of Admiralty, and to the following note on the 4th section of the Admiralty Court Act, giving jurisdiction over claims for building, equipping, or repairing of ships:—

“ This is the first section extending the jurisdiction ; does it also confer a lien ? To none more naturally and justly might this species of security be given if that had been the intention, since it is by their money that the ship exists as she is ; and, indeed, at common law, for building and for repairs there is a lien. But in the supposition that the statute confers a maritime lien, the restriction on these persons against arresting the ship for themselves is quite unintelligible ; whereas, assuming that a new right of action in *rem* without a maritime lien is conferred, it is extremely natural that these parties should be restricted to their common law rights and remedies until the proceeding which is adopted by others against the *res* places their money in jeopardy. Even this limited right is lost by the transfer of the vessel to a *bonâ fide* purchaser. This would not have been so if there had been a maritime lien which follows the *res* notwithstanding a sale, unless it be a sale by order of the Court. In this appears the importance of the view suggested by the statute, that it introduces a new right of action in *rem*, without conferring a lien where it did not exist before.”

Chemistry. By William Thomas Brande, D.C.L., F.R.S.L. & E., &c., and Alfred Swaine Taylor, M.D., F.R.S., &c. London: John W. Davies. 1863. pp. 892.

WE should be stepping out of our province, and assuming a knowledge to which we can lay no claim, if we ventured to review this volume on its scientific merits. For these we are willing to accept the names of the distinguished editors as a guarantee for the efficiency of the work. But looking at it from the lawyer's point of view, we can state what, upon a careful examination, seems to us to be its recommendation to the profession. It contains clearly written definitions and explanations, valuable to the amateur in science : in its pages are collected a great number of facts, historical and other, bearing on the subject, and brought down to the latest date, as (for one instance out of hundreds) the new process for manufacturing

malleable platinum, by Deville, and illustrated in the International Exhibition. The section on this metal (pp. 615—621) is a good specimen of the excellence of the book. There is much information useful to those who have to deal with poison cases, and others of a like nature; and a careful index saves the trouble of search.

**Every Man's Own Lawyer.** A Handy Book of the Principles of Law and Equity. By a Barrister. London: Lockwood & Co. 1863. pp. 336.

THE barrister who compiled this volume should have put his name on the title-page, that he might enjoy the gratitude due to him from the profession of the law. Should his book sell extensively and be frequently acted on, we would venture to predict a considerable increase to the business of litigation. It is not badly compiled; and though the information given is not always strictly accurate, it is perhaps nearly as much so as can be expected in a work which professes to squeeze the law of England into a little more than 300 small pages. But it is idle to suppose that any layman really in want of safe legal information would obtain it in this book. In ordinary life, a little common sense will supply the place of a great deal of law; but if law is wanted, the public had better go at once for the genuine article than take it in this "patent medicine" sort of form. To the profession itself the work could be of no value.

**An Essay on Waste, Nuisance, and Trespass; chiefly with reference to Remedies in Equity; treating of the Laws of Timber, Mines, Lights, Water Support, the Construction of Public Works, &c. &c.** By George V. Yool, M.A., of Lincoln's Inn, Barrister-at-Law, late Fellow of Trinity College, Cambridge. London: W. Maxwell. 1863.

ONE of the most venerable branches of the great common law of England (whereof so much has been learnedly written by Lord Coke in the Institutes) is that which relates to offences against realty. Waste, nuisances, and trespass, are coeval with property in lands, and either by custom or statute, their legal characters have for many centuries been well ascertained. The legal and equitable remedies which they called forth are scarcely less ancient. But although the great principles of this department of real property law owe their origin to the learning and wisdom of remote times, they have received a novel application in our own age. "Waste of the forest," "waste of estanges," "waste of vivary," "waste of a weare," are more or less unfamiliar terms to a modern English lawyer; whereas there is a present interest in such questions as, how far a tenant for life impeachable of waste has a right to continue the working of mines? whether he may sink new shafts for the purpose of following up a vein of coal? whether a tenant for life has a right to open pits or mines which have been abandoned? whether a new vein or bed may be worked

by means of an old shaft? what the rights of a dowress may be in mines opened after her husband's death? how far the owner of the soil may, by injunction, prevent his property being broken up to insert gas-pipes, telegraph wires, &c. &c.? when trespass will lie against companies who have obtained parliamentary powers to construct canals, railways, &c. &c.? Mr. Yool, in his *Essay on Waste, Nuisance, and Trespass*, has collected, and commented upon the judicial decisions and recent statutes which exhibit the application of the ancient maxims and doctrines of the common law to the new wants and circumstances of civilised times. It is no disparagement to add that originality was possible only in the exposition of the more recent decisions and later statutes. The old treatises had sufficiently expounded the old law; but, in addition to a very clear and strictly accurate account of what may not perhaps be to the reader altogether new, he will find valuable additions to the ancient learning in the modern cases which have been judiciously selected and intelligently construed.

It should also be stated that the volume has been compiled chiefly to explain the equitable reliefs and remedies which may be obtained in the Court of Chancery and Common Law, in reference to these correlate offences. Considering the progress which has recently been made in the assimilation of the powers and procedure of the Courts of Law and Equity, it is to be regretted that the author has not embodied in his treatise to a sufficient degree the practice of the former in regard to injunctions and other equitable powers recently conferred upon them, and which they not unfrequently exercise in cases of waste, trespass, and nuisance. This work will probably pass through the present edition rapidly; and the next, we trust, will be supplemented with an account of the operation of the new statutory common law powers conferred on the Court of Chancery, as far as pertinent to the subjects treated of in this book, and also of the equitable powers exercised in reference to the same in Westminster Hall.

**The Merchant Shipping Amendment Act, 1862.** With an Introductory Analysis, an Appendix, &c. By James O'Dowd, Esq., of the Middle Temple, Barrister-at-Law and Assistant-Solicitor for the Merchant Shipping Department of Her Majesty's Customs. London: Butterworths. 1863.

For a country of such great commercial intercourse as England, good text-books on the laws of Merchant Shipping are of the first importance. Mr. O'Dowd, who had a hand in the making of the Act of 1862, has now undertaken to edit it. As the result, we have here an interesting and elaborate book. The Act conferred increased jurisdiction in salvage cases upon the County Courts, Quarter and Petty Sessions; and in order to make his book more useful to practitioners in these Courts, Mr. O'Dowd has appended a digest of the most important salvage decisions. A better book, of its kind, we have



not seen for some time. The author has spared no trouble to make it complete, by an elaborate analysis, an appendix of cases and forms, and also by that requisite of all books—a very fair index. Not only ought it to be in the library of the lawyer, but also in the hands of county and borough magistrates, and men of business. The title-page is too modest to convey a notion of the scope of the book. The Analysis is, in truth, an accurate treatise on the law of Merchant Shipping. From it (p. 69), we extract the following, on the interesting subject of derelict at sea, as a fair example of Mr. O'Dowd's perspicuous writing:—

“The title which is acquired to property by finding is a species of occupation; and it is laid down as a rule of law by the civilians that the mere discovery or sight of the thing is not sufficient to vest in the finder a right of property in the thing found (Pothier, ‘*Traité de la Propriété*’). His title is acquired by possession, and this must be an actual possession. He cannot take and keep possession by an act of the will *oculis et affectu*, as he may when the property is transferred by contract, and the possession given by symbolical delivery. To consummate his title, there must be a corporal prehension of the thing. Though it is said, it is established by custom, and that such was the ancient law of the Romans, when two are near together or in company where the thing is found, that the title is acquired in common (Pothier, ‘*Pandects*,’ xli. 1–8; Heineccius, ‘*Recitationes in Intit.*,’ 350; ‘*Vocet ad Pandect.*’ xli. 1–9). Upon these principles, the discovery of wreck left derelict by three schooners, and the boarding of her from one of them, were sufficient to give them the right of possession (the schooner *John Wurts*, Olcott’s R. 462).”

**The Testament of the Law; or, the Truth about the Devolution and Distribution of Property in Cases of Intestacy; with a Proposal for an Intestacy Act, to include Real as well as Personal Estate; being a Letter addressed to the Right Honourable John Earl Russell. By Thomas Boyfield Sikes, Solicitor. London: Arthur Hall & Co. 1862.**

UNDER this somewhat quaint title, the author has presented a particularly clear and compendious statement of the leading provisions of the law of inheritance (3 & 4 Will. IV. c. 106), and of the several statutes of distribution. The pamphlet is addressed under the form of a letter to Lord Russell, with the avowed object of inducing “the great middle class of England (as the author has it) to insist on the reformation of a law which so intimately affects the domestic happiness of their families.” From a preface so impassioned, we were not prepared for an argument so temperate and well sustained. The author writes apparently under a conviction which has grown deeper and deeper with advancing years. Referring to the inefficiency and injustice of the laws now controlling the devolution and



distribution of property in cases of intestacy, he urges the necessity of their immediate revision in this strain. "Such is my anxiety to supply this deficiency, and so indignant am I at the existence of those legal anomalies which do nothing but engender quarrels and lawsuits between the different members of a family, that I cannot be content to remain any longer a silent spectator of their baneful operation." In the ardour of controversy, Mr. Sikes has once or twice missed the point, and allowed his judgment to be thrown off its balance. Hard words not unfrequently spoil even good arguments, and a writer possessing unquestionable ability with only too much fervour, would do well as soon as possible to change declamatory censure for a more discriminating and temperate antagonism. It is not in good taste to assume that the whole legal profession is banded together in a selfish and unscrupulous conspiracy to oppose wise reforms; nor is there any justification for the bold insinuation that, "when the law is simplified, when the perplexing distinctions in the succession to real and personal estate, which are the source of so much litigation are removed, men of the law know very well that a portion of their occupation is gone." The author is also in error when he confounds simple acquiescence in the present state of things, with some hidden and deeply contrived scheme on the part of lawyers to defraud the public of their rights; and it is silly extravagance of speech to add "that to be mute under such circumstances is to be *particeps criminis*—to be accomplice and abettor of those who are always conspiring against everything in the shape of legal reform." After so grandiose a preface, the only excuse for noticing the pamphlet itself is the good sense and excellent taste by which it is distinguished. Mr. Sikes has evidently bestowed upon the subject a good deal of sound practical thinking. The canons of descent have been well considered, and compared not only with the familiar genealogical chart in the text-books, but with the habits and wants of the present age. Many of the suggestions thrown out are really worthy of careful reflection. With reference to the distribution of personal estate, these are some of the changes he would recommend: "Where an intestate dies without wife and issue, and leaving a father and brothers and sisters him surviving, the same objection which was made to a father taking the whole of his intestate son's real estate equally applies to his taking the whole of his personalty, in which, I contend, the brothers and sisters ought to be allowed to participate with their father. Neither is it fair or just that an aged grandfather or grandmother should be excluded by the brothers and sisters of the intestate from participation in the personalty, when they are all in equal degree of kindred to him. . . . The right of representation among collateral kindred should not be confined to the children of brothers and sisters, but should be extended to their issue in *infinitum*, in the same manner as among the intestate's lineal descendants." It is also suggested that, in the event of there being no issue or next of kin to a deceased husband dying intestate, the widow should not only be entitled to a moiety of the personalty, but to the whole. "To give the eldest son the whole of the land,

and also an equal share of the personal estate with his younger brothers and sisters, is so monstrous an act of injustice that such a disproportion of property, I verily believe, is not sanctioned by the law of any other country in the world. . . . What I propose, therefore, is an Intestacy Act, under which the whole of the intestate's property, real and personal, should vest in an administrator, who should be authorised to convert the same into money, and divide the residue among the distributees. Power should be given to the Court of Chancery, in cases where it might be deemed advisable, to prevent the administrator from selling the whole or any portion of such property. With respect to the persons who should be the distributees, the order in which they should succeed, and the proportions of the intestate's property which they should take in every case, it would be desirable in any new enactment (with the above exceptions) to imitate the present statute of distributions." The whole argument is founded upon the proposition that property, real and personal, should by law descend, and be distributed as much as possible in that course which would have been marked out by the deceased, had he or she disposed of the same by will; and it is only just to the author that this notice should conclude with a cordial acknowledgement of the ability and cogency with which the argument is maintained.

Supplement to a Treatise on the Law of Partnership; including its Application to Joint-stock and other Companies. By Nathaniel Lindley, of the Middle Temple, Esq., Barrister-at-Law. London: William Maxwell, 32 Bell Yard, Lincoln's Inn. 1863.

Two years ago, Mr. Lindley's Treatise on the Law of Partnership was welcomed by the profession as a valuable and elaborate addition to the legal text-books of this country. Since that time, two important statutes — the Bankruptcy Act, 1861, and the Companies Act, 1862 — have been passed, and many leading decisions have been pronounced. The completeness of the original work has thus been broken up by the legislation of the last two years, and it became necessary to adapt it to the present state of the law. There were two ways in which this might have been done. A new edition of the whole work might have been issued, incorporating the new Acts and decisions throughout the two volumes, as they originally stood. This arrangement would have entailed a double expense upon the purchasers of the first edition, inasmuch as they would have been compelled to buy over again a great bulk of matter already in their possession. Mr. Lindley has wisely adopted the more economical plan of publishing a supplemental volume, containing everything that is new on the subject, indexed and arranged for reference to the original work. It will be remembered that the first treatise was divided into four parts. The first related to the *creation* and *dissolution* of partnerships. The second treated of the *rights* and *obligations* of partnerships and companies, as regards non-members. The third, of *rights* and *obligations*, as between the members themselves; and the fourth, of the *dissolution* and *winding-up* of partnerships and

companies. The present Supplement is divided into two parts. "The first part consists of notes, showing what alterations require to be made in the text, irrespectively of the Companies Act, 1862. These notes are placed in the order of the pages of the original treatise; and by turning from any page in the present Supplement, the alterations and additions which ought to be made will at once be seen. The second part is devoted exclusively to the Companies Act, 1862, and consists of four chapters, corresponding with, and intended to be supplementary to, the four books, into which the original treatise is divided." The notes throughout are written with the accuracy and clearness which were so conspicuous in the first edition. All the leading recent decisions are collected and commented upon, so that the reader will find the law as it now stands with regard to almost every question connected with partnership. The important case of *Cox v. Hickman* (5 Ho. Lo. Ca. 268) had not gone up to the House of Lords when the original work was issued. The present Supplement follows up the case to the highest Court of Appeal, and contains a clear analysis of their Lordships' judgments. Nor has the author given too much space to the consideration of that case, seeing that by it the law, as laid down in *Waugh v. Carver*, is modified in a most material respect. The House of Lords have now decided, "that whether persons who share the profits of a business incur the liabilities of partners or not depends upon whether that business is carried on by themselves personally or by others as their agents." Thus a great branch of partnership law has been substantially placed on a new footing, by making agency the true test of partnership, and not the agreement to share profits to an indefinite extent.

*Studies in Roman Law, with comparative Views of the Laws of France, England, and Scotland.* By Lord Mackenzie, one of the Judges of the Court of Session in Scotland. Edinburgh and London: Blackwood & Sons.

THIS is, in many respects, one of the most interesting works that the legal press has issued in our time. On perusal it will be found to be something more than its modest and yet attractive title would indicate. Although we do not value so highly as Lord Mackenzie appears to do some of the authorities cited, we regard the book as an important contribution to the learning of comparative jurisprudence. It, in fact, forms a lucid exposition of the principles and rules of law, municipal and international, which prevail in and are recognized by the countries referred to, with a historical summary of the Roman Law, by way of introduction; and the author is one of Her Majesty's Judges, actually on the Bench, and in the daily discharge of his judicial duties. Its claims to attention and authority, therefore, are of a peculiar nature, and very different from those accorded to other law books, however able and well written, while at the same time the responsibility attaching to its statements is proportionably great.

The explanation of the Roman law, historical and expository—the “Studies”—is admirably given, clear, and simple, and yet very learned, and the whole work is conceived in a candid and liberal spirit, being besides distinguished by a calmness of tone eminently befitting the judicial pen. As a literary composition it has great merits; the topics are well selected, the language good, and the style generally thoughtful and assured.

We observe in it allusions, which are highly suggestive, on some of the subjects of the day. To these, as well as to the other characteristics of the book, we hope to direct attention in a future number, stating our views with all frankness, and with all the consideration and respect which are due to the learned Lord of Session.

*The following will be noticed in our next Number.*

**Handy-book on the Diminution of the Poor Rates.** By T. G. Grady, Esq., Recorder of Gravesend. London: Wildy & Son. 1862.

**An Elementary View of the Proceedings in an Action at Law.** By J. W. Smith, Late of the Inner Temple, Esq., Barrister-at-Law, Author of “Leading Cases.” Eighth Edition; Adapted to the Present Practice by Samuel Prentice, Esq., Barrister-at-Law. London: W. B. Stevens, Sons, & Haynes. 1863.

**The Criminal Law Consolidation and Amendment Acts of the 24th & 25th Vic.** With Notes, Observations, and Forms for Summary Proceedings. By C. S. Greaves, Esq., Q.C. Second Edition. London: V. & R. Stevens, Sons, & Haynes; H. Sweet; and W. Maxwell. 1863.

**The Shipping Law Manual; a concise Treatise on the Law governing the Interests of Shipowners, Merchants, Masters, Seamen, and other Persons connected with British Ships, together with the Acts of Parliament, Forms, and Precedents relating to the Subject; being especially intended for Popular Use in Sea-port Towns.** By W. T. Greenhow, of the Inner Temple, Esq., Barrister-at-Law. [ London: V. & R. Stevens, Sons, and Haynes. 1863.

## Events of the Quarter.

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THE following judgment was delivered by Chief-Justice Erle on the 16th of January, in the Court of Common Pleas, in the case *Kennedy v. Broun*:—

In this case the defendant obtained a rule to show cause why the verdict for the plaintiff should not be set aside, and either entered for the defendant if there was no evidence of a debt, or for a new trial if the verdict was against the evidence. The material facts upon the first question are, that in the course of the suit between Swinfen and Swinfen, the plaintiff, a barrister, became the advocate of the present defendant, and during the continuance of that litigation she made repeated requests to him for exertions as an advocate, and repeatedly promised to remunerate him for the same, and after the end of the litigation she spoke of the amount of this remuneration; and for the purposes of the present judgment, we assume that she admitted the amount of debt due for such remuneration to be 20,000*l.*, and promised to pay it. These facts are no evidence to support the verdict, if the promise of the defendant did not constitute any obligation, and we are of opinion that it did not. We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation. For authority in support of these propositions we place reliance on the fact that in all the records of our law, from the earliest time till now, there is no trace whatever either that an advocate has ever maintained a suit against his client for his fees in litigation, or the client against an advocate for breach of a contract to advocate; and as the number of precedents has been immense, the force of this negative fact is proportionally great. To this we add the tradition and understanding of the profession, both as known to living memory, and as expressed in former times. Sir John Davies (*Davis's Rep. Pref.*, p. 23) declares that understanding at the beginning of the seventeenth century, when he says, "that the fees of professors of the law are not duties certain, growing due by contract for labour or service, but gifts; not *merces*, but *honorarium*." Sir John Davies would have ample experience of the rules of the profession from his eminence in the law, and his opinion is entitled to much weight. Lord Stowell, as appears in a work remarkable for learned research (*Wallace's Reporters*, p. 27), speaks of him as a "poet, a lawyer, and a statesman, and highly distinguished in each of these characters." Lord Hale declares the same understanding of the profession in the note to *Co. Lit.*, 295a, saying, "a counsellor

cannot bring any action (*id est* for his fees), for he is not compellable to be a counsellor. His fee is *honorarium*, and not a debt ;” and for this he cites Lord Nottingham’s MSS. The same note contains the opinion of Mr. Butler to the same effect, saying that in England the fees of counsel are honorary in the strict acceptation of the word. Blackstone also (vol. iii. p. 28), declares the same understanding:— “ A counsel can maintain no action for his fees, which are given not as *locatio* and *conductio*, but as *quiddam honorarium*, not as salary or hire, but as mere gratuity.” As we know of no authorities that conflict with these, we only add the names of the Judges who have had occasion to declare an opinion to the same effect, and they are Lord Hardwicke, Lord Kenyon, Kindersley, V.C., Pigot, C.B., and Bayley and Best, J.J. These are authorities for holding that the counsel cannot contract for his hire in litigation. The same authorities we rely on to show that the client cannot contract for the service of the counsel in litigation. There is the same absence of any precedent for such an action, and the reason for the one incapacity is good for both. We proceed to the authorities on which the plaintiff relied. Instead of examining each citation separately, we think it more convenient to take them in classes, and to give the reason why each class appears to us to have no weight. The proposition is confined to incapacity for contracts concerning advocacy in litigation. This class of contracts is distinguished from other classes on account of the privileges and responsibility attached to such advocacy, and on this ground we consider the cases unconnected with such advocacy to be irrelevant. Thus the barrister who contracted to serve as returning officer (“*Egan v. Kensington Union*,” 3 Q. B., 324), and the barristers who contracted to serve as arbitrators, and the barristers who contracted either for an annual sum by way of retainer or for an annuity *pro consilio impenso et impendendo*, made contracts not concerning litigation, and therefore not within the incapacity here in question. It may be that a contract for a general retaining fee for a counsel may not bind at the present day, because it relates in substance to litigation, and so may be distinguished from annuities to a standing counsel who was required to guide by his advice in the management of property and general affairs. The change in the habits of Courts and the practice of the Bar since the last mentioned cases were decided has probably made the position of an advocate now as different from that of standing counsel then as the position of the clergy now differs from that which they held when private chaplains were hired to serve as chaplains and perform other work, and were prosecuted for breach of their contracts to serve under the statute of 23 Edward III., relating to labourers, in one of which prosecutions, against a parochial chaplain for breach of his contract to serve as seneschal and be parochial chaplain, the Court of Common Pleas thought that, as far as related to his duty as chaplain, he might be considered to be in the service of God, and therefore not within a statute expressed to relate to mowers and reapers and the like, but hesitated so to decide till they had consulted their brethren of the other bench, and had their sanction. But, be



that as it may, fees unconnected with litigation are irrelevant to our present judgment, and this distinction seems to be taken in "*Mengay v. Hammond*" (Cro. Jac., 482), where the plaintiff sued for an annuity *pro consilio*. The defendant pleaded a refusal of the plaintiff to sign a bill in the Star Chamber, and the plea was held bad because a counsellor with such a fee is not bound to put his hand to every bill, but only to give counsel. With respect to the *dicta* cited by Mr. Kennedy relating to the liability of counsel for their conduct as advocates, they are all considered and overruled in the action of "*Swinfen v. Lord Chelmsford*" (5 Hurlst. and Nor., 518). Some relate to retainers relating to purchases of land, or similar services, and so are not within the incapacity here in question, and although the *dictum* of Paston (C. J. 14, H. 6, fo. 18, p. 58), "that action lies against a serjeant who fails to attend in court," and a *dictum* by Stokes, counsel, to the same effect, relate to litigation, yet they are mere remarks in the course of an argument and not adjudications, and they were expressly overruled as before mentioned. Mr. Kennedy cited *Rastel's Ent.*, p. 2, as containing precedents for actions against an attorney or counsel, for not appearing in court according to his retainer; but the book contains no entry against a counsel for that wrong. There are three entries in succession. The first is against an attorney, and is for that wrong. The second precedent is against a counsel who was retained to advise about the purchase of a manor, and betrayed his client's secrets and interest, and is not an entry which relates to litigation; and the third is against a counsel, but it is for a penalty under a statute, for taking retainers on both sides as an *ambidexter*. The citation from Rastel, therefore, does not support the plaintiff's argument. A considerable part of Mr. Kennedy's learned research consisted of anecdotes of various classes relating to barristers, irrelevant to the point for adjudication, because irrelevant to capacity or incapacity for contracting for advocacy. Such are the anecdotes relating to the habits of barristers when they held communication with their clients personally before the rights and duties of attorneys and solicitors were ascertained, and the advocate did the work of each branch of the profession — habits which continued in Jersey until lately. (See Jersey case, 13 Moore's P. C., 263.) Such also are those relating to alleged endeavours by barristers to obtain larger fees. Whether this has been done or not, and whether a communication in respect of the amount of the fees be made to the client by the clerk or the barrister, the nature of the fee is not altered, nor is the right to sue for it affected thereby. Such also are those relating to payment after instead of before the service is performed. In England the general usage is prepayment. On the continent, under the Roman law and the modern French law, and in some exceptional cases in England, the fee is paid after the service. But again, the nature of the fee is not altered by the time of payment. The anecdotes in each of these classes show that the payments are of gratuities and not of debts, and, so far as they are to be noticed for adjudication, tend to support the defendant's case. As to express contracts, certain *dicta* by Pigot, C.B., and by Pollock,



C.B., were cited for the purpose of proving that a barrister had capacity to make himself liable under a special contract with his client concerning advocacy, though not by an implied contract. We think that the effect of those *dicta* has been misunderstood. A special contract differs from an implied contract only in the mode of proof. If a brief marked with a fee for a given place of trial is left in silence, there would be some evidence of an implied contract to pay the fee were there no usage to the contrary, and no incapacity for such a contract. If the same brief is left with an express contract to pay the fee there would be an express contract if there were no incapacity. Where the service of the barrister according to usage is for a gratuity, that usage would be presumed to continue unless there was an express contract rebutting that presumption, and where there is no incapacity the presumption from usage is rebutted by an express contract. Pollock, C.B., does not refer to any authorities, but the cases referred to by Pigot, C.B., show that this was his meaning, for he refers to the cases above mentioned, where barristers, either as returning officers or as arbitrators, sustained actions for their fees. The incapacity depends on the subject matter of the contract, not on the mode of proof. When the contract is proved its incidents are the same whatever was the kind of evidence adduced for proof. If there is incapacity, words and implication are alike nullities, and no contract can result; but where there is no incapacity, and there are conflicting presumptions in respect of the *consensus* essential to create contract, there evidence of express words of clear meaning is decisive proof. In this sense the observation of Wood, V.C. ("Attorney-General v. College of Physicians," 1 Johnson and H., 561) must be understood, saying, "That a physician might recover his fees if he makes a special contract." We know of no incapacity affecting a physician according to usage, the practice being for a fee, which is *honorarium*, not *merces*, and no action lies where the parties are presumed to have acted according to this usage; but if the presumption is rebutted by evidence of an express contract, such contract binds, and a physician may sue and be sued thereon, as was held in "Veitch v. Russell," 6 Car. and M. 362. Mr. Kennedy argued that under the civil law an advocate could sue for his fees, and that Blackstone made a mistake in referring thereto to support a contrary opinion. In this it appears to us that the mistake is on the part of the plaintiff. Throughout the whole growth of the Civil Law, from the foundation of Rome to the *Digest of Justinian*, not only was the advocate always under incapacity to make any contract for his remuneration, but also throughout a part of that time he was under prohibition from receiving any gain for his services; whether the name be *donum*, or *merces*, or *honorarium*, is immaterial; the substance of the law was invariable, he never could contract for *merces*, though during part of the time he might lawfully accept a *donum*. In the beginning all agree that the patron received no money for advocacy; afterwards he took gifts to an excess, and was restrained in the year 550 A.U.C., by the "*Lex Cincia de*

*donis et muneribus ne quis ea ob causam orandam caperet.*" If gifts were prohibited, à fortiori contracts for payments would not be allowed. This prohibition of all gifts for advocacy was further enforced by Augustus in the year 732 A.U.C., commanding advocates to plead gratuitously, and for breach they were ordered to refund fourfold. This prohibition against all gifts to advocates was relaxed in a time of great debasement, when, according to the passage in Tacitus referred to by Blackstone (*Anal.* lib. 11, c. 7), "Non quicquam publicæ mercis tam venale fuit quam advocatorem perfidia." The Senate sought to enforce the Cincian law forbidding all gifts for protection against abuses on the part of advocates. Sicilius, an advocate of singular infamy, offered some of the arguments which have been urged in support of mercenary advocacy. The Emperor took an intermediate course, and by a decree fixed the *maximum* which an advocate might lawfully receive by way of gift at 80*l.*, and made him liable to refund if he took more. The words of Tacitus are—"Claudius capiendis pecuniis modum statuit ad dena sestertia quem egressi repetundarum tenerentur." The Senate made a further effort in the same direction, passing a law that every suitor before he took any step in the suit should swear that he had neither given nor contracted to give any money for advocacy. Pliny, in the passage referred to by Blackstone (*Epist.*, lib. 5, 21), writing of a new edict by a prætor to enforce practically some recent laws, says:—"Sub edicto erat senatus consultum, hoc omnes qui quid negotii haberent, priusquam agerent, jurare jubebantur nihil se ob advocationem cuiquam dedisse promississe, cavisse. His enim verbis et mille præterea et venire advocationes, et emi vetabantur. Peractis tamen negotiis permittebat pecuniam duntaxat decem millia dare." Although after this time gifts within the limited amount were lawful, still contracts with advocates during litigation are not shown to have been ever at any time sanctioned by the law of Rome. Mr. Kennedy referred to the *Digest*, lib. 50, tit. 13, art. 10 and 12, to prove that an advocate could sue for his fee under the extraordinary cognizance of the *preses*, but we do not find that these articles prove his contention. Art. 10 seems to relate to a suit by a client against an advocate to make him refund so much of a fee already paid as exceeded the legitimate amount, and gives the principle for estimating what that amount should be:—"In honorariis advocatorum ita versari debet iudex ut pro modo litis, pro advocati facundiâ, et fori consuetudine in quo acturus erat estimationem, adhibeat dummodo licitum honorarium non egrediatur." The article concludes with a rescript applicable only to refunding part of a fee:—"Eam duntaxat pecuniam quæ modum legitimum egressa est repetere debet." Art. 12 relates to securities and bargains for fees, and gives the rule when a suit can be maintained thereon. The effect seems to be that a promise while the litigation is pending does not bind, but that a security given after the cause is at an end may be enforced if the sum secured, together with the sums paid, does not exceed the legitimate amount. We have now considered as much of the authorities referred to as seems to us to be relevant, and in our judgment

they support the propositions on which the defendant relies—viz., that the relation of counsel and client in litigation creates an incapacity to contract for hiring and service as an advocate. If the authorities were doubtful, and it was necessary to resort to principle, this same proposition appears to us to be founded on good reasons. The facts of the present case forcibly show some of the evils which would attend both on the advocate and the client if the hiring of counsel was made binding. In this case the advocate by disclosing words of intimate confidence which passed in moments of helpless anxiety has raised the phantom of a contract for a sum of monstrous amount, and of this we hope we may say that there is no one in the profession of the plaintiff who would be willing to accept from him this verdict of 20,000*l.* as a gift. In the present case, too, if the client compares the competence and peace secured for her by her former advocate with the perils and the miseries of wearisome litigation derived from her later advocate, the contrast may suggest to her that gratuity is preferable to contract as a mode of remunerating advocates. But it is not merely on such considerations as these that this law is based. The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests—namely, the administration of justice. We are aware that in the class of advocates, as in every other numerous class, there will be bad men taking the wages of evil, and therewith also, for the most part, the early blight that awaits upon the servants of evil. We are aware, also, that there will be many men of ordinary powers performing ordinary duties without praise or blame; but the advocate entitled to permanent success must unite high powers of intellect with high principles of duty; his faculties and acquirements are tested by a ceaseless competition proportioned to the prizes to be gained—that is, wealth, and power, and honour without, and active exercise for the best gifts of mind within. He is trusted with interests, and privileges, and powers almost to an unlimited degree. His client must trust to him at times for fortune, and character, and life. The law trusts him with a privilege in respect of liberty of speech, which is in practice bounded only by his own sense of duty; and he may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul. The law also trusts him with a power of insisting on answers to the most painful questioning; and this power, again, is in practice only controlled by his own view of the interests of truth. It is of the last importance that the sense of duty should be in active energy proportioned to the magnitude of these interests. If the law is that the advocate is incapable of contracting for hire to serve, when he has undertaken an advocacy, his words and acts ought to be guided by a sense of duty—that is to say, duty to his client, binding him to exert every faculty and privilege and power, in order that he may maintain that client's right, together with duty to the Court and himself, binding him to guard against abuse of the powers and privileges entrusted to him by a constant recourse to his own sense of

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right. If an advocate with these qualities stands by the client in time of his utmost need, regardless alike of popular clamour and powerful interest, speaking with the boldness which a sense of duty can alone recommend, we say the service of such an advocate is beyond all price to the client, and such men are the guarantees to communities for the maintenance of their dearest rights, and the words of such men carry a wholesome spirit to all who are influenced by them. Such is the system of advocacy intended by the law, requiring the remuneration to be by gratuity; but if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract, rather than by principles of duty; that words sold and delivered according to contract, for the purpose of earning hire would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates might be degraded. It may also well be that, if contracts for hire could be made by advocates, an interest in litigation might be created, contrary to the policy of the law against maintenance, and the rights of attorneys might be materially sacrificed, and their duties be imperfectly performed by unscrupulous advocates; and these evils, and others that may be suggested, would be unredeemed by a single benefit that we can perceive. The subject has been often and ably discussed, so that we have already said more than sufficient. We would only add that in the growth of the English law the advocates have been important agents in establishing liberty of thought and speech and action, which has resulted from the contests in Courts where such liberty has been contended for. The English advocates in our historical trials are entitled to be gratefully remembered, and it must not be forgotten that their minds were trained in the practice of advocacy without any contract. So also the Roman jurists are entitled to be gratefully remembered, because their intuitive sense of right showed to them where right was in the conflicts of interest perpetually arising, as the relations of man to man multiplied; and their words have helped to guide succeeding generations in their search for right, when similar conflicts arose. And it must not be forgotten that throughout the Roman system it was held that an advocate and a Professor of Law would be degraded by a contract of hiring, and that his reward was to be gratuitous. Mr. Kennedy has cited the *Digest*, lib. 50, tit. 13, arts. 10 and 12, on which we have remarked above. The title relates to the limits of the *extraordinaria cognitio* of the *preses*; and it may not be superfluous to add art. 5, expressly excluding therefrom suits by the class of Professors of Law, for a reason applicable to all advocates. On principle, then, as well as on authority, we think that there is good reason for holding that the relation of advocate and client in litigation creates the incapacity to make a contract of hiring as an advocate. It follows that the requests and promises of the defendant and the services of the plaintiff created neither an obligation nor an inception of obligation, nor any inchoate right whatever, capable of

being completed and made into a contract by any subsequent promise. By reason of that incapacity the present case is distinguished from "*Lampleigh v. Brathwaite*" and the cases following thereon. In all of them the defendant was assumed to have received from the plaintiff such a valuable consideration as would have made a valid contract, if a promise had been made before the consideration had passed. Here the defendant received nothing from the plaintiff which was capable of forming a consideration to support a promise, at whatever time such promise may have been made. In "*Lampleigh v. Brathwaite*" it was assumed that the journeys which the plaintiff performed at the request of the defendant, and the other services he rendered, would have been sufficient to make any promise binding if it had been connected therewith in one contract. The peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably, at the present day, such service on such request would have raised a promise by implication to pay what it was worth, and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount. On the same principle, the cases cited in sequel to "*Lampleigh v. Brathwaite*" were also distinguished. In each of these cases the defendant had, by the permission of the plaintiff, received value belonging to the plaintiff which was sufficient to support any promise. As to one class, the original promise was excluded by the Statute of Frauds; but a subsequent promise was held to be evidence to support an action on an account stated ("*Pinchon v. Chilcot*," 3 Car. and P., "*Sego v. Dean*," 4 Bing, 459, "*Cocking v. Ward*," 1 C.B., 858). As to another class, a claim in equity to money was converted into a cause of action at law by an express promise to pay it to the plaintiff ("*Roper v. Holland*," 3 Ad. and E. 99, "*Topham v. Morecraft*," 8 Ad. and E. 972, "*More v. Hill*," 2 Peak, 10). For these reasons we think that the plaintiff's case is not within the principle of "*Lampleigh v. Brathwaite*," and we do not consider it to be our duty to extend the application of that principle. With respect to the claim for compensation for leaving Birmingham and coming to London, and for services in issuing publications for the purpose of creating a prepossession in favour of the defendant, there are several answers, of which two will suffice. The first is that these services were ancillary to the service as an advocate, and if the principal service could not be the subject of a contract, neither could any service which was merely accessory thereto and of no value without the principal. The second is, that the account is stated of the total of the claims, and if any one of the claims of undefined amount is to be omitted the statement of the account is disproved, and the action founded on such statement of account fails. We have now gone through the whole of the case, and we come to the conclusion that the plaintiff has not established a cause of action. It follows that the rule must be made absolute to enter the verdict for the defendant. If the judgment on this part of the rule should be reversed in a Court of Error, it will then be our duty to dispose of the remaining part relating to a new trial; and, following the



precedent in "*Betts v. Menzies*" (28 *L. J.*, Q. B., 370), we order the part of the rule relating thereto to be suspended until further order.

Mr. ex-Justice Crampton died, on the 29th December, of bronchitis, at his residence, near Enniskerry, in the 81st year of his age. He was called to the Irish bar in 1810, and was subsequently professor of law in Trinity College, Dublin. In 1830, Mr. Crampton was appointed Solicitor-General for Ireland; and in 1832 was appointed a judge in the Court of Queen's Bench, from which office he retired on a pension in 1858.

The Benchers of Gray's-inn have resolved that the arms of Mr. Napier, ex-Lord Chancellor of Ireland, shall be placed in a compartment of one of the windows of their hall. The right hon. gentleman has acknowledged the compliment in a letter to the treasurer, of which the following is a copy:—

" 4, Merrion Square, S.

" Dear Mr. Treasurer,—I have to return my cordial thanks to the benchers of Gray's-inn for the honour which they have conferred upon me by the resolution, a copy of which you have now forwarded. My early connection with your ancient inn has been agreeably revived by the genuine hospitality with which, in common with the Attorney-General for Ireland (Mr. Whiteside), and other distinguished members of the Irish bar, who had been admitted to Gray's-inn, I have been greeted in the hall by the masters of the bench in recent years. To be had in memory within the venerable walls where the illustrious Bacon found an early home and a retirement at the last for his chastened spirit, where so many of the greatest lights and ornaments of our profession have been admitted and held in honour—statesmen, senators, and judges—men who have guided the councils, moulded the laws, and administered the justice of this free and happy realm, to be associated with such companions in arms, "the noble living and the noble dead," is a distinction of which any man might be justly proud. To me, as an Irishman, it is doubly gratifying. It assures me of a professional regard as mutual and as kindly as our private friendship, and it harmonizes with the desire now cherished by us all to assimilate the judicial systems of the two countries as the best security for the pure administration of justice in both. It may encourage the student as he treads the path which leads to preferment and honour, when he finds the way is open alike to Irish as to English competition. The Irish bar is honourably connected with Gray's-inn, which can boast of judges of the superior courts and law officers of the Crown in Ireland among its distinguished members. I trust that this happy and auspicious connection may not only be perpetuated, but extended. Among the benchers of Gray's-inn there are companions of my Parliamentary life, and friends whom I have long esteemed and valued; and I know not any honour which could be more grateful than this which they

have so generously conferred and you have so suitably communicated.—I have the honour to be, dear Mr. Treasurer,

“Your faithful and obliged,

“JOSEPH NAPIER.

“To A. J. Stephens, Esq., Q.C., LL.D.,  
“Treasurer of Gray's-inn.”

The Yelverton Marriage Case came to a conclusion on the 19th December, on which day judgment was given in the First Division of the Court of Session in favour of the pursuer, Mrs. Yelverton, reversing, by a majority of the judges, the decision given by Lord Ardmillan in July last. Lord Curriehill and Lord Deas were of opinion that the pursuer had proved a marriage, according to Scotch law, by interchange of consent, and by promise followed by intercourse. The Lord President differed, holding that the evidence adduced by the pursuer had not been sufficient to establish either point.

## APPOINTMENTS.

THE Queen has been pleased to appoint the Right Hon. Earl Grey; the Right Hon. Lord Naas; the Right Hon. Lord Cranworth; the Right Hon. Lord Chelmsford; the Right Hon. Sir John Somerset Pakington, Bart., G.C.B.; the Right Hon. Spencer Horatio Walpole; the Right Hon. Joseph Warner Henley; the Right Hon. Edward Pleydell Bouverie; the Right Hon. Sir Alexander James Edmund Cockburn, Bart., Chief Justice of the Court of Queen's Bench; Horatio Waddington, Esq.; Russell Gurney, Esq., Recorder of the City of London; Charles Owen O'Connor, Esq. (commonly called the O'Connor Don); and Hugh Culling Eardley Childers, Esq.; to be her Majesty's Commissioners to inquire into the operation of the Acts relating to transportation and penal servitude, and into the manner in which sentences of transportation and of penal servitude have been and are carried into effect, under the provisions of the said Acts, or any of them.

Mr. J. G. Teed, Q.C., has been appointed Judge of the Lincolnshire County Courts (circuit 17), in the room of the late Mr. J. G. Stapylton Smith, deceased.

Sir J. E. Eardley Wilmot, Judge of the Bristol County Court, has been appointed Judge of the Marylebone Court, vacant by the death of Mr. J. C. Adolphus. Mr. Willis, Judge of the Northumberland County Courts, has succeeded Sir J. Eardley Wilmot; and Mr. W. Blanchard, of the Northern Circuit, has been appointed Judge of the County Court of Northumberland.

Mr. Francis Edward Guise, of the Oxford Circuit, has been appointed Recorder of Hereford, in the room of Mr. Serjeant Pigott, resigned.



The Right Hon. Spencer Walpole, M.P., has been appointed an Ecclesiastical Commissioner, in the room of Mr. Deedes, deceased.

Mr. G. Wingrove Cooke has been appointed to the Copyhold and Enclosure Commission Board, in the room of the late Mr. Mules.

Mr. J. Osbourne, Mr. J. R. Kenyon, Mr. T. Southgate, and Mr. A. Hobhouse, Members of the Equity Bar, and Mr. J. St. George Burke, of the Parliamentary Bar, have been appointed Queen's Counsel.

At a Pension of the Hon. Society of Gray's Inn, Mr. Thomas Southgate, Q.C., took his seat as a Benchers of the Society.

Mr. Edward Lloyd, Barrister-at-Law, has been appointed Secretary to the Royal Commission for Inquiry into the Patent Laws; and Mr. T. F. Kent, of the Equity Bar, Secretary to the Commission of Inquiry into Convict Discipline.

Mr. C. F. Trower, gentleman of the Chamber to the Lord Chancellor, has been appointed Secretary of Presentations, in the place of Mr. P. H. Pepys, appointed principal Secretary to the Lord Chancellor.

Mr. Holdship has been appointed Registrar to the Court of Chancery, in the place of Mr. F. Metcalfe, deceased; and Mr. W. Pugh has been appointed Clerk in the Registrar's Office, in the room of Mr. Holdship.

Mr. W. R. Drake, of the firm of Bircham, Dalrymple, and Drake, has been appointed Treasurer of the Lancashire County Courts, vacant by the death of Mr. Hugh Hulton.

Mr. Robert Holsby, of York, Solicitor, has been appointed Clerk of Arraignment of the Northern Circuit, vacant by the death of Mr. W. T. Pritchard.

The Master of the Rolls has appointed E. S. Bailey, J. H. Bolton, W. S. Cookson, C. K. Freshfield, F. H. Janson, Henry Lake, Edward Lawrence, Joseph Maynard, Parke Nelson, F. J. Nicholl, William Stephens, and William Williams, Esquires, Solicitors, to be Examiners for the current year, to examine candidates for admission to practice as Solicitors of the Court of Chancery. And the same gentlemen, with the addition of Ralph Barnes, John Clayton, William Murray, and Edward Leigh Pemberton, Esquires, Attorneys, have been by the Common Law rule appointed to examine all candidates for admission as Attorneys for the same period.

Mr. Johann Fried Christoph Muncke, Ph. D., and Mr. Christopher Knight Watson, M.A., have been appointed special examiners for the intermediate examinations of Articled Clerks in the present year.

Mr. W. H. Ashurst has been appointed Solicitor to the Post-Office, in the room of the late Mr. Peacock, deceased.

Mr. Thomas James Nelson has been elected City Solicitor. Mr. Mackrell, the senior Under-Sheriff for London and Middlesex, appointed Solicitor to the Irish Society; and Mr. A. J. Baylis, Solicitor to the City Commissioners of Sewers, each in the room of the late Mr. Charles Pearson.

SCOTLAND.—The Solicitor-General, Mr. Edward Francis Maitland,

has been appointed to the vacant seat on the Bench, in succession to Lord Ivory, and Mr. George Young has been appointed Solicitor-General. Mr. A. R. Clark, Sheriff of Inverness-shire, has succeeded Mr. Young as Sheriff of Haddington and Berwick. Mr. W. Ivory has been appointed Sheriff of Inverness-shire, and Mr. A. B. Shand Sheriff of Kincardineshire, vacant by the death of Mr. Montgomerie Bell.

**IRELAND.**—Mr. Edward Parkyns Levinge, of the Home Circuit, has been appointed a Judge in the High Court of Fort William, Bengal, and Mr. Richard O'Reilly has been appointed Assistant Crown Counsel for the County of Meath, vacant by the promotion of Mr. Levinge.

Mr. Joshua Clarke, Q.C., has been appointed Chairman of the Quarter Sessions of Cowan, vacant by the death of Mr. P. M. Murphy, Q.C.

Mr. Lionel E. Fleming has been appointed Crown Solicitor for the County of Longford. Mr. John Francis Teeling, Solicitor, has been appointed Assistant-Registrar to the Court of Bankruptcy, vacant by the death of Mr. Thomas Battley.

Mr. Robert F. Franks has been appointed Secretary to the Ecclesiastical Commissioners, in the room of the late Mr. Thomas Burke.

The Benchers of King's Inn have elected Mr. Joseph M. Lambarte, Barrister-at-Law, to the office of Librarian. Mr. James Henry Monahan, Barrister-at-Law, has been appointed Purse-bearer to the Lord Chancellor, in the room of Mr. David Pigott, lately appointed Assistant Barrister for the County of Louth.

**AFRICA.**—Mr. George Frere has been appointed Judge, Mr. E. L. Layard, Arbitrator, and Mr. W. T. Smith, Secretary or Registrar of the mixed Court, established at the Cape of Good Hope for the suppression of the Slave Trade; and Mr. George Skelton, Judge, and Mr. W. Smith, Secretary or Registrar of a similar Court at Sierra Leone, under the Treaty of April last, between Great Britain and the United States.

Mr. Charles Mills has been appointed Sheriff of the Territories of British Kaffraria.

**CEYLON.**—Mr. Henry Byerley Thomson has been appointed Puisne Judge of the Supreme Court; and Mr. R. F. Morgan has been appointed Her Majesty's Advocate.

**INDIA.**—Baboo Sumbhoo Nath Pundit, of the Calcutta Bar, has been appointed Judge of the High Court of Calcutta.

Mr. Henry Newton, of the Bombay Civil Service, has been appointed Judge of the High Court of Bombay.

**LAGOS.**—Mr. R. W. Gifford Watson has been appointed Chief Magistrate of the Settlement.

**MAURITIUS.**—Mr. Robert Temple has been appointed Master of the Supreme Court of the Island; and Mr. G. Barthelemy Colin has been appointed Puisne Judge.

**QUEENSLAND.**—Mr. James Cockle, of the Midland Circuit, has been appointed Chief Justice of the Colony.

## CALLS TO THE BAR.

*Michaelmas Term, 1862.*

**INNER TEMPLE.**—David Knox Mair, Esq., M.A.; Thomas James Richard Hilton, Esq., B.A.; Alexander Oliver, Esq., B.A.; Jean Pierre Georges Aubin, Esq.; Robert Watson, Esq.; Robert William Cary Reeves, Esq., LL.B.; Philip Albert Myburgh, Esq., B.A.; Hubert Seymour Leeson, Esq.; the Honourable Edward Nugent Leeson, B.A.; Henry Davidson, Esq., M.A.; John Edward Meek, Esq., B.A.; Charles Edward Fox, Esq., B.A.; John Edward Barker, Esq., M.A.; Alfred Jobling, Esq.; Robert French Sheriff, Esq.; Richard Lambert, Esq.; Brian Wilkes Wand, Esq., B.A.; and Florence Crauford Grove, Esq.

**GRAY'S INN,**—Berkeley William King, Esq.; Henry Danby Seymour, Esq., B.A., M.P.

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*Hilary Term, 1863.*

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**MIDDLE TEMPLE.**—William Tayler, Esq.; John Hill Gough, Esq. (holder of Certificate of Honour, first class); William Robertson, Esq.; William Thomas Makins, Esq., B.A.; Henry Graham Lawson,

M.A., Esq.; Fleming Smythe, Esq.; and John Leybourne Goddard, B.A., LL.B., Esq.

INNER TEMPLE.—William Grantham, Esq. (holder of the Studentship awarded this present Hilary Term); William Arundell Yeo, Esq., B.A.; James Marsham Moorsom, Esq., B.A.; Albert Venn Dicey, Esq., M.A.; Bruce Campbell, Esq.; Alexander Mortimer, Esq., B.A.; Erlysman Pinckney, Esq., B.A.; James Thomas Foard, Esq.; Henry Mason Bompas, Esq., M.A., LL.B.; Frederic Thomas Durell Ledgard, Esq., B.A.; Ralph Forster, Esq., M.A.; and Robert Barclay Chapman, Esq.

## EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

*Michaelmas Term, 1862.*

At the examination of candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recommended the following gentlemen, under the age of twenty-six, as being entitled to honorary distinction:—

Frank William Stone, aged 21; Samuel Stephenson Booth, aged 22; Stephen Brown Dixon, jun., aged 23; Daniel Birt, aged 24.

The Council of the Society have accordingly awarded the following prizes of books:—

To Mr. Stone, the prize of the Honourable Society of Clifford's-inn; to Mr. Booth, the prize of the Honourable Society of Clement's-inn; to Mr. Dixon and Mr. Bird, each one of the prizes of the Incorporated Law Society.

The examiners also certified that the following candidates passed examinations which entitle them to commendation:—

Francis George Gorton, aged 21; Mr. Tuffnell Samuel Cedric Houghton, aged 21; Owen Low, aged 24; Thomas Porter Lyon, aged 21; Henry Thomas, aged 23.

The Council accordingly awarded the certificates of merit.

The examiners have further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to prizes or certificates of merit if they had been under the age of 26:—

Alfred Curtis, aged 33; Joseph Gratian Jackson, aged 35.

The number of candidates examined in this Term was 98; of these 74 were passed, and 24 postponed.

At the public examination of the students of the Inns of Court, held at Lincoln's Inn Hall, on the 30th and 31st of October, and the 1st of November, 1862, the Council of Legal Education awarded to Edward Gilbert Herbert, Esq., a studentship of fifty guineas per

annum, to continue for a period of three years; and to John H. Gough, Esq., a certificate of honour of the first class; and to Mordaunt Pemberton, Esq., Alexander J. Robertson, Esq., George Miller, Esq., Robert French Sheriff, Esq., James Mew, Esq., Edmund Turnoe, Esq., James P. Wyatt, Esq., Robert William Cary Reeves, Esq., Robert Watson, Esq., and William Henry Alexander, Esq., certificates that they have satisfactorily passed a public examination.

And at the examination held on the 8th, 9th, and 10th November, the Council awarded to Mr. William Grantham, student of the Inner Temple, a studentship of fifty guineas per annum, to continue for a period of three years; and to Mr. Arthur M. Channell, student of the Inner Temple, Mr. James Marshall Moorsom, student of the Inner Temple, Mr. Bruce Campbell, student of the Inner Temple, and Mr. Frederick Whitting, student of Lincoln's Inn, certificates that they have satisfactorily passed a public examination.

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## Necrology.

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### *September.*

- 4th. HENRY GILBERT, Esq., Solicitor, aged 56.  
 21st. HUME, JAMES, Esq., Senior Magistrate of Calcutta.  
 30th. MASFEN, HORACE, Esq., Barrister, aged 36.

### *October.*

- 29th. GREEN, THOMAS, Esq., Barrister, aged 26.  
 31st. FIELD, G. Y., Esq., Solicitor.

### *November.*

- 2nd. BROWN, CHARLES W., Esq., Solicitor, aged 31.  
 7th. MURPHY, R. M., Esq., Q.C.  
 7th. LEDIARD, THOMAS, Esq., Solicitor.  
 12th. FALKNER, FRANCIS, Esq., Solicitor.  
 15th. WHATELEY, WILLIAM, Esq., Q.C., aged 68.  
 17th. KENDALL, JOHN, Esq., Solicitor, aged 55.  
 19th. MANSON, W. PITT, Esq., Barrister, aged 34.  
 20th. BELL, W. ANTHONY, Esq., Stipendiary Magistrate of Jamaica.  
 22nd. BUCKTON, JAMES, Esq., Solicitor, aged 69.  
 23rd. COLES, H. BEAUMONT, Esq., M.P., Barrister.  
 23rd. LLOYD, F. W., Esq., Barrister.  
 25th. LATOUR, EDWARD DE, Esq., late Officiating Judge in the High  
       Court of Calcutta.  
 27th. WITHERS, F. R., Esq., Solicitor.  
 27th. VIZER, WILLIAM, Esq., Solicitor, aged 56.  
 27th. GRAY, WILLIAM, Esq., Solicitor, aged 60.  
 28th. BUCK, ANTHONY, Esq., Solicitor, aged 65.  
 30th. BUCKING, ALFRED, Esq., Solicitor.

### *December.*

- 4th. BASHAM, GEORGE, Esq., Solicitor.  
 4th. MULES, HENRY C., Esq., Copyhold, Enclosure, and Tithe  
       Commissioner, aged 46.

- 6th. WATERWORTH, T. W., Esq., Solicitor, aged 24.  
9th. PIERCE, F. R., Esq., Barrister, aged 34.  
9th. THOMPSON, FREDERICK, Esq., Barrister.  
16th. BRAY, JOSEPH, Esq., Solicitor, aged 64.  
19th. NICHOLSON, STEWART F., Esq., Solicitor.  
21st. FOX, CHARLES J., Esq., Solicitor, aged 38.  
21st. KEKEWICH, GEORGE, Esq., late Judge at the Cape of Good Hope, aged 84.  
24th. ADOLPHUS, J. LEYCESTER, Esq., County Court Judge.  
29th. ALLNUTT, E. G. STEVENS, Esq., Barrister, aged 47.

*January.*

- 2nd. SIMMS, JAMES, Esq., late Puisne Judge of Newfoundland, aged 83.  
5th. DANCE, CHARLES, Esq., Registrar of the late Insolvent Debtors' Court, aged 69.  
8th. HUNTLEY, R. F., Esq., Barrister.  
12th. RYMER, W. H., Esq., Solicitor, aged 54.  
13th. TAYLOR, HENRY, Esq., Barrister, aged 43.  
14th. ST. GEORGE, T. B., Esq., Barrister, aged 81.  
15th. BABINGTON, W. ST. LEGER, Esq., LL.D., Barrister.  
16th. ROGERS, G. J., Esq., Solicitor.



## List of New Publications.

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*Acts*—Public General Acts 25th & 26th Vict., 1862; intended as a Supplement to the Commercial and General Lawyer. 8vo., 4s. 6d. sewed.

*Archbold*—New Law of Bankruptcy, with the General Orders of the Bankruptcy Court and County Courts; and a Supplement, comprising the Decided Cases on the Subject, to September, 1862. By J. F. Archbold, Esq., Barrister. Second Edition, 12mo., 18s. cloth.

*Arundell*—A Practical Treatise on the Law relating to Mines and Mining Companies. By J. W. Arundell, Solicitor. Post 8vo., 4s. cloth.

*Bullen and Leake*—Precedents of Pleading in Personal Actions in the Superior Courts of Common Law; with Notes and Appendix. By E. Bullen and S. M. Leake, Esqrs., Barristers. Second Edition. Post 8vo., 26s. cloth.

*Cox*—Law and Practice of Joint Stock Companies and other Associations, as regulated by the Companies' Act, 1862. By E. W. Cox, Esq., Barrister. Fifth Edition. 12mo., 12s. 6d. cloth.

*Greenhow*—The Shipping Law Manual; a concise Treatise on the Law governing the Interests of Shipowners, Merchants, &c., with Forms and Precedents, By W. T. Greenhow, Esq., Barrister. 8vo., 20s. cloth.

*Halliday*—A Digest of the Examination Questions in Common Law, Conveyancing, and Equity. By R. Halliday, Solicitor. Third Edition. 8vo., 15s. cloth.

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No. XXIX.

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ART. I.—THE DISCIPLINE OF THE BAR.\*

**E**XCUSES are hardly needed, except such as are personal to myself, for bringing forward before this Society a subject which has attracted of late much attention on the part of the public. That attention has been roused partly by the painful investigations recently held on the conduct of members, who, to the outer world, at least, appeared to be in the foremost ranks of the Bar—resulting, in one case, in the expulsion from the profession of a barrister holding the rank and honours of a Queen's Counsel, a Recorder, and a Member of Parliament; and, in another, also that of a barrister, holding the same honours, in the severe censure by the benchers of his Inn upon his professional conduct; and partly by a recent case which has been decided by the Court of Common Pleas, involving one of the most serious questions which can arise between a counsel and his client.

These unfortunate cases naturally lead us to the consideration of the important question whether the organization of the

\* A Paper by Mr. G. Shaw Lefevre, read at a General Meeting of the Society for Promoting the Amendment of the Law, held on Monday, 2nd Feb., 1863.

Bar of England, which has so long been entrusted to the Societies of the Inns of Court, is effectual in supporting the honour and dignity of the profession, and whether the discipline which the benchers of these Inns enforce, and their mode of proceeding in the cases brought before them, provide sufficient guarantees to the public. In the observations which I shall venture to offer to you on this topic, I shall, for the most part, confine myself to the nature and origin of the jurisdiction of the Inns of Court and their benchers—to the manner in which that jurisdiction is exercised—to some of the principal rules of discipline and etiquette—to the uncertainty of many of the rules themselves—and to the inconvenience thus resulting to the Bar and to the public.

The Bar of England cannot, with any certainty, be traced further back in our history than the 13th century; for it was not till after the Magna Charta that the Courts of Law were permanently settled at Westminster, instead of following, as previously, the king's person in his journeys through the country; and it was about the same time that persons, no longer of the clerical order, practising as barristers and attending the Court, formed themselves into societies, which were partly intended as seminaries of learning and partly as bodies for the maintenance of discipline among their order.\* Although there is no account extant of the founding of these Inns or Societies, it is certain that, from a very early period, they were recognised by the Courts of Justice, and that to their members was conceded the exclusive right of being heard on behalf of suitors before the judges of the land in the superior Courts of Law. According to the best authorities, these four Inns of Court are to be considered in the nature of voluntary associations, which from time immemorial have had their powers delegated to them by the judges;† they

\* Dugdale's *Origines Jurid.*, p. 141. Fortescue de *Legibus.*, chap. 49.

† It has been laid down by a high authority that Courts of Justice have necessarily a power of determining what persons shall practise before them

have no corporate existence—they act under no charters—they are not amenable to any direct interference of the law by *mandamus* or otherwise—but the judges of the land, acting as visitors, have a certain authority over them; and the ancient, usual, and only way of redress to members for any grievance in the Inns is by appeal to the judges.\*

However obscure the origin of these Societies or Inns of Court and their jurisdiction, it is not difficult to account for them when we look back at the early history of our social institutions. We may recollect that in those times every trade or profession was subject to its special rules and bye-laws, either determined and enforced by law or by its own guild or corporation—rules which had in view the education of the members of the trade or profession, the enforcement of honesty among them, the regulation of wages and fees, the prevention of competition, the limitation of their numbers, and other similar objects; but while in most professions and trades these guilds have disappeared, leaving little or no trace behind them but their ancient halls and their large revenues, which are now disposed of in feasting and charity, and while the laws which interfered with the regulation of wages and competition have from time to time been repealed, so far as they affected inferior trades and professions, in conformity with the advance of the doctrine of Free Trade, with the Bar it is otherwise; there the old organization has survived, and some little of its power over its members.

In looking back at the annals of the Inns of Court, we find that, from an early date, the judges, acting in their

as advocates; that in this country this power or duty has been delegated to the Inns of Court; but that in the colonies where there are no similar societies, the power of admission suspending or disbarring Barristers has been rightly exercised by the judges. A case was referred to where the Recorder's Court of Bombay had suspended from practice for six months the whole Bar. See Lord Wynford in the *Justices of Antigua*, 1 Knapp's P. C. Cases, p. 267.

\* *Boorman's Case*; March Rep. 177; *Townshend's Case*; 2 Sir J. Raymond's Rep. 69. *R. v. Gray's Inn*; Doug. 353; *R. v. Lincoln's Inn*; 4 Barnwell v. Cresswell Rep 855.



character as visitors, from time to time issued orders, with the consent of the benchers of the Inns of Court, with respect to the discipline of their members. Though far from numerous, these orders appear to have had in view such objects as the special training in learning of their students, the moral and professional conduct of barristers, the due limitation of their numbers, and the prevention of competition.

For example, in 1557, 3 and 4 Philip and Mary, an order of all the Inns of Court was made:

“None attorney shall be admitted. In all admissions henceforth this condition implied, that if he that is admitted practise any attorneyship, *ipso facto*, he be dismissed, and to have liberty to repair to the Inn of Chancery whence he came.”\*

Again, in the year 1574:

“Orders necessary for the government of the Inns of Court, established by the commandment of the Queen’s Majesty, with the advice of her Privy Council and the Justices of her Bench and the Common Pleas (signed by Bacon, Burleigh, and Walsingham). Imprimis: That no more in number be admitted from henceforth than the chambers of the houses will receive after two to a chamber. Nor that any more chambers shall be builded to increase the number; saving that in the Middle Temple they may convert their old hall into chambers not exceeding ten.

“If any hereafter admitted in court practise as attorneys or solicitors, they shall be dismissed and expelled out of their houses thereupon.

“None to be allowed to plead before the Justices of Assizes except he be allowed for a pleader in the Courts of Westminster, or shall be allowed by the Justices of Assizes to plead before them.”†

Again, in the year 1596, it was agreed by all the judges, with the assent of the benchers of the four Inns of Court,

\* Dugdale’s *Origines*, p. 311.

† *Ib.* p. 312.

that hereafter none shall be admitted into the Inns of Court till he may have a chamber within the house, and in the meantime to be of some Inn of Chancery. That there be in one year only four outer barristers called in any one Inn of Court.

That such students be called who be fittest for their learning and honest conversation, and well given.\*

In another place I find an order which has certainly of late years, though unrepealed, been neglected:

“That no fellow of these societies should wear any beard above a fortnight’s growth.”

In the first year of James I. an order was made, signed by Sir E. Coke, that none be hereafter admitted into the Society of any house of Court that is not a gentleman by descent.†

In the twelfth year of the same king “Orders for the reformation and better government of the Inns of Court and Chancery, agreed upon by the common and uniform consent of the readers and benchers, and the four houses and Courts, which orders proceeded first from his Majesty’s especial care and commandment, and were after recommended by the said readers and benchers, by the grave direction and advice of all the judges.

“For that the Societies ought to give a powerful example of good government in matters of religion, and to be free not only from the crime, but from the suspicion of ill affection in that mind, it is ordered:—That every gentleman of the several Societies aforesaid which shall be in commons at any time within one year after the publishing of these orders, and shall not receive the communion by the space of one year together, shall be expelled, *ipso facto*.

\* Dugdale’s *Origines*, p. 316.

† *Ib.* p. 316; Fortescue *de Legibus*, p. 111. So also at Rome, under the kings and in the early times of the republic, advocacy was confined to the Patrician order, in whom, however, it was a duty as well as a privilege.

“For that there ought always to be preserved a difference between a counsellor-at-law, which is the principal person next unto serjeants and judges in administration of justice, and attorneys and solicitors, which are but ministerial persons, and of an inferior nature; therefore it is ordered: That from henceforth no common attorney or solicitor shall be admitted to any of the four houses of Court.

“For that the over great multitude in any vocation or profession doth but bring the same into contempt, and that an excessive number of lawyers may have a farther inconvenience in respect of multiplying of needless suits, it is therefore ordered: That there shall not be called to the Barr, in any one year, by readers or benchers in any one Society, above the number of eight.

“That for the time to come no outer barrister begin to practise publickly at any Barr at Westminster until he hath been three years at the Barr.”\*

With the exception of these and a very few similar orders, directed by the judges to the Inns of Court, which are to be found in Dugdale's *Origines*, and which relate, in many cases, to such matters as the dress and general demeanour of members of the Inns, there is no record of any rules for the guidance of these Inns, or for the admission, regulation, and discipline of their members. The existence, however, of these rules is important, as showing that the sovereign, by advice of the judges, and, in some cases, without the consent of the benchers, issued directions for the guidance of the Inns of Court—precedents which it will be well to bear in mind.

All attempt at limiting the number of admissions, or ascertaining the legal qualifications of candidates, has long been abandoned; and, for many years past, almost the only condition of admission to the Inns has been a certificate of fitness and respectability signed by a bencher of the Inn or by two

\* Dugdale's *Origines*, p. 317.

barristers. The admission, however, is subject to the approval of the benchers of the Inn, and they refuse their consent to persons engaged in trade, to those who have taken Holy Orders, to those whose names have not been struck off the rolls of attorneys to Parliamentary agents, and barristers' clerks. It is also understood that they will refuse their consent to any one of whom they have information that he is an unfit person for the profession through some moral disqualification, and from the decision of the benchers refusing admission to any person there is no appeal. There is still no opportunity of reviewing these decisions, notwithstanding the strong recommendations to this effect of the Common Law Commissioners in their 6th Report, 1834. It is still matter entirely within the discretion of the benchers who happen to be present at the time of the application for admission, whether they will consent or no, or what, if any, moral or other qualification they will require.

The student once admitted, three years must elapse before he can be called to the Bar—years which are presumed to be passed in study; but during which, all that is required by the Inns of Court is that he should be present at a certain number of dinners in each term, and attend a certain number of lectures, which latter may be dispensed with, if he prefer running the chance of passing an examination. Except this, which is voluntary, there is no qualification in legal attainments required at the call to the Bar. The Inns of Court, therefore, do not in any way guarantee that their members are in any way fitted for the confidence of the attorneys or the public, in respect of knowledge of the law, or even that they are not absolutely ignorant of the subjects requisite for their profession.

This is still the case, notwithstanding the unanimous Report of a Royal Commission eight years ago, of which the present Lord Chancellor, the present Chief Justice of the Queen's Bench, Mr. Justice Keating (then all practising

at the Bar), Vice-Chancellor Sir W. Page Wood, Sir J. Coleridge, the Right Hon. Joseph Napier, and, I may add, among others, Sir J. Shaw Lefevre, were members—and who were of opinion that, “as regarded the intellectual qualifications and professional knowledge of a barrister, there was not such security as the community was entitled to require.” The scheme which they recommended has not been adopted, and nothing whatever has been done. Objection may, however, again be taken at the call to the Bar, to the moral qualifications of the student, and the benchers may, if they see good reason, refuse to call him to the Bar. From this decision of the benchers there is an appeal to the judges, but there is no prescribed mode of hearing the candidate before the benchers, or of taking and recording the evidence produced before them. They are simply required to give a certificate of their reasons for refusing to call the appellant to the Bar.

The barrister thus called to the Bar is admitted at once to all the privileges of the profession. He has, in common with other barristers, the exclusive right of appearing for and addressing the judge on behalf of suitors in the Superior Courts; and he has further the privilege, not enjoyed by any other class I believe in the country, of not being liable for any breach of contract, or for any act of negligence in the exercise of his profession, unless such act be tainted with *mala fides*. On the other hand, he has no legal remedy for the recovery of his fees; and, according to the recent decision of the Common Pleas, it is not competent for him to enter into any contract for payment by his client with respect to litigation, either before, during, or after such litigation. He still, however, continues under the authority of the Inn to which he has been called, and is liable to expulsion from that Inn and from the exercise of his profession, at the instance of the benchers of his Inn; or he may have his professional and moral conduct inquired into by the benchers, and sub-

jected to their censorial remarks. The Serjeants-at-law must be excepted from this statement. This ancient body, who for upwards of 600 years, and till within a few years ago, had the exclusive right of pleading in the Court of Common Pleas, is not subject to the authority of the Inns of Court. From the time of receiving his patent from the Crown, which is given only on the recommendation of the Chief Justice of the Common Pleas, the serjeant ceases to be a member of his former Inn. The receipt of the patent was, in ancient times, celebrated with great formality and by a feast in the Inn to which he belonged, lasting for seven days. I cannot ascertain that the serjeants are subject to any rules or discipline of their fellow-serjeants, and there is no precedent for any inquiry into the conduct of one of their members, probably because there never has been cause for such inquiry in that most honourable body. But as the serjeants have lost their exclusive privileges and retain only a certain precedence at the Bar, the dignity is not so much coveted as that of Queen's Counsel; and if it were not that the dignity is not given as a reward for political services, it is not more unlikely that there should arise a necessity for inquiry, than in the case of Queen's Counsel, and it would be well if doubts on this point were set at rest. The judges are all members of Serjeants' Inn, and it is there that they meet to hear cases of appeal from members of the Inns of Court.

I can find no record of any rules laid down by the Inns of Court for the observance by their members who are barristers, and I believe none such exist; nor is there any definition of the particular acts or conduct which will render a barrister liable to expulsion or to the censure of his Inn. It is understood that any gross misconduct connected with his profession, or of such a nature outside his profession, as shows him to be unworthy of trust, will render him thus liable, and also any notorious and continued breaches of professional etiquette. But to what extent this misconduct must be carried before the

benchers will act, is quite undefined and unknown;\* nor are there any well-known or defined rules of etiquette for the guidance of members of the Bar. The Inns of Court are in the nature of a *forum domesticum*, and may inquire into any matter or conduct of their members; and may censure or expel any member, subject, as before, to an appeal to the judges. But it is matter of grave doubt whether there is an appeal, except in the case of disbarment.

The benchers of the four Inns of Court have, from time immemorial, been self-electing bodies, and unrestricted, I believe, as to numbers. It has been usual of late, almost as a matter of course, to elect any member of the Inn who has been called to the bar as a Queen's Counsel; but if three of the benchers present object, the candidate is not elected;† and there are cases in which the newly-made Queen's Counsel has not solicited the honour. The benchers thus elected vary from about twenty in Gray's Inn to about sixty in Lincoln's Inn. As regards the Bar and the public, the only duties of any importance which these benchers have to perform are those before alluded to of admitting candidates as students, calling them to the Bar, and exercising a certain control over them when called.

\* In the case of *Seymour v. Butterworth*, quoted at length in the February Number of the *Law Magazine* for this year, p. 312, Chief-Justice Cockburn thus charged the jury: "I take it to be beyond dispute that if the conduct of a member of an Inn of Court is such as to be unworthy of a gentleman and a member of the profession, he is within the jurisdiction of that forum. We hear of charges in the army of conduct unbecoming an officer and a gentleman; and although there may be no breach of military discipline, yet the breach of individual honour is held to be a sufficient ground for inquiry and for such animadversion as the case may call for. In like manner, if the conduct of a member of the Bar is such as to be unworthy of a barrister, and unworthy of a gentleman, that again is always considered to be a proper matter to be inquired into by the benchers of an inn of court." With all respect for the opinion thus expressed, I venture to say that there is among benchers of the Inns, as also among members of the Bar, great difference of opinion as to the extent of the authority of the Inns of Court; many are of opinion that they have no right to inquire into any act of a member unless it is connected closely with his practice in the profession, while others think that such inquiries should extend to all acts or conduct of a member even beyond his practice in the profession, if they be such as, in the ordinary sense, are unworthy of a gentleman.

† At Lincoln's Inn the majority of benchers present decide.



Beyond these functions, which do not, as now performed, entail much labour upon them, they have no others than to administer their ample funds and revenues, which they have proved before the Commission of 1855 to be no more than sufficient to maintain their libraries, chapels, gardens, and lecturers.\*

In what manner the inquiries into the conduct of members of the Inn are carried out by the benchers is matter of gravest concern both to the profession and to the public. It is understood that such inquiries often take place in an informal manner after dinner, and before such of the benchers as may happen to be present; that evidence is taken by a short-hand writer; that counsel are sometimes heard for the member whose conduct is in question; and that the inquiries are strictly private. They have not, however, it would seem, the power of examining on oath, or of compelling the production of witnesses or documents, nor any of the powers which are ordinarily vested in a Court of Justice. It is uncertain whether they have even the power of questioning a barrister summoned before them as to any alleged act or practice, or of demanding from him an explanation. In the absence of any authority upon this subject, or of any annals of the Inns of Court, open to inspection, we have to fall back upon a casual account of their proceedings, such as has been presented to us in the recent trial arising out of Mr. Seymour's case. Though the circumstances of that case were most peculiar, no one, I think, can come to any other conclusion from it than that, as now constituted, the tribunal or parliament of benchers fails in the qualifications necessary for conducting such important

\* I find in the Report of the Royal Commission of 1855, the income of the four Inns of Court amounted in the aggregate, in 1854, to £57,957 3s. 6d., of which about £36,000 was derived from rents and dividends. The expenditure on their libraries was £2,122; on their chapels, £2,328; lecturers and studentships about £2,000; interest on mortgages £1,300. The remainder was spent in repairs, in their establishments, and in their kitchens. I would suggest that, as a great additional convenience to barristers and students, the libraries should be kept open at least as long as it is light, instead of being closed at 4 p.m., even though this might necessitate the further expense of assistant librarians.

inquiries ; not for want of capacity in its members, than whom there are not in the profession men of higher honour and standing, but from the weakness inherent to so informal a tribunal. It is scarcely possible to imagine cases which require greater care and delicacy of treatment than those which involve so penal a conclusion as disbarment ; and every possible assistance should be given both to the benchers and to the barristers, whose conduct is in question before them, for the discovery of truth and the vindication of honour. It is obvious that from want of due authority as a constituted Court, there arose the confusion which ended in the action so full of public scandal to the Society of the Middle Temple.\* Complaint has been further made in the public papers by Mr. Digby Seymour, that in his case, of fifteen meetings held by the benchers, in no single instance was the parliament composed a second time of the same members as any previous parliament, and that the numbers attending varied from a maximum of eighteen to a minimum of seven, and that only two members attended all the meetings. Without expressing any opinion on the merits of this case, or whether Mr. Seymour was justified in making this objection, I cannot but think that in an inquiry of so important a nature, such a course, and it has not been contradicted, was very far from being calculated to ensure a proper consideration of the case, either for or against the accused ; but it would seem to be inevitable in a body so numerous as the benchers of the Middle Temple, many of whom are barristers in the greatest practice, and who must find great difficulty in attending an inquiry of such length.

Then, again, the charges which were investigated by the benchers were in respect of matters which occurred six, seven, and eight years before the inquiry ; they were matters which were known to many members of his circuit, and were generally bruited about in the profession years before

\* This defect was pointed out in the Report of the Royal Commission, and a remedy suggested ; no action, however, was taken upon it.

the inquiry took place, and before Mr. Seymour had been raised to the dignity of a Queen's Counsel. I am far from saying that time should be a bar to all charges whatever against a counsel; but where there has been no good cause for the long continued abstinence of the prosecutors, it is matter of serious consideration whether, having regard to the difficulty of proof and disproof, such charges should be entertained. In such cases accusations are unjustly made against the benchers that they take no action till the accused is in position high enough to be an object of professional jealousy—accusations, the groundlessness of which can only be known to the Bar. In Mr. Seymour's case, if the inquiry had been made soon after the commission of the alleged acts, there would have been better opportunities of ascertaining the truth of the matters, and the benchers would have been spared the pain of censuring the conduct of one whom the Government had so recently thought proper to make a Queen's Counsel. It is probable that the delay which took place in this case was owing to the imperfect means which the benchers of his Inn have of ascertaining any information respecting the professional conduct of their members, particularly of those in the junior ranks of the profession; an objection which arises from the constitution of such a tribunal.

Yet another defect in the means which the benchers have of maintaining discipline among their members is brought to light by the difficulty which they appear to labour under of giving publicity to their discussions. In Mr. Seymour's case, the judgment, which was the result of their investigation, was communicated to the public in a document which was screened in the Hall. The document contained no name to connect it with the particular case, and it was only by inference that it could be so understood. In Mr. Edwin James's case, again, the nature of the charges which led to his expulsion from the profession were long withheld from the public, and it was not till some months

after that the public were favoured, through the pages of the *Law Review*, with the true nature of the charges in respect to which Mr. James was condemned. In the meantime, Mr. James had been able to present himself to a public and a profession on the other side of the Atlantic, as if he had been compelled to leave this country on account of pecuniary difficulties only. It is true that the profession here were well aware of what had been the nature of his offences, but not so the general public. It would certainly seem that in cases of disbarment the reasons for it should be made public, for the sake both of the Bar and the public, to justify the one and to protect the other.

Besides the tribunal of the benchers which has thus been described, there is for barristers who join a circuit another quasi tribunal in the Bar mess of the circuit. The admission to the mess is by ballot; and, if the candidate is blackballed, the practice is to appoint a committee to inquire into his antecedents, and to report the same to the mess, upon which the admission is again discussed. The same tribunal asserts the right to inquire into the professional and moral conduct of its members; and, after a report from a committee of inquiry, a discussion takes place, which ends either in censure or expulsion from the mess. It is well understood, however, that the Bar mess has authority only so far as extends to expulsion from its own society, and that it cannot prevent the barrister from practising in the Courts on circuit. Authorities differ upon the question whether it has the right to forbid its members to hold briefs with the expelled member. Moreover, there is not any recognised practice or means of communicating with, or transmitting information to, the benchers of the Inn to which he may belong. The discussions before the mess upon these subjects take place after dinner, and as might be expected, are not of a nature to insure uniformity of practice or much respect for decisions arrived at. Breaches of etiquette often pass unnoticed. It has, however, occurred that the

circuit mess has properly expelled a member for acts against public morals where no action has followed from the Inns of Court, and where it must be presumed either that the benchers do not consider such acts as within their cognizance or that they have no means of receiving information upon matters even of public notoriety.

The various sessions exercise the same kind of limited control over members of their mess.

The penalty which the circuit and sessions mess thus hold out to their members is insufficient; for though men of high feeling generally keep themselves much within the rules of etiquette, and are sometimes over-punctilious in the observance of supposed rules which have no real existence, to men who are without these feelings, the knowledge that nothing more can result than the loss of the Bar society, takes off from the efficacy of the penalty; and to the men who are excluded or who have never been admitted, but who are still free to practise on circuit, there is wanting a powerful check upon malpractices, the fear of forfeiting the good-will and opinion of their fellows.

The offences which are the subject of inquiry before these tribunals, both of benchers and circuit mess, are, as I have already pointed out, of two kinds:—firstly, dishonest conduct, professional or otherwise; secondly, breaches of professional etiquette, the distinction being this, that there is nothing necessarily in itself dishonest or improper in the act which comes under the latter head, but it is forbidden by rule of the profession, because the interest of the Bar or the public so requires; not but that some breaches of etiquette are dishonest—such as the making a secret agreement with the attorney to work off a debt—but the dishonesty is in the secrecy, in pretending to keep to the rules of etiquette, and in secretly breaking them. It will be readily understood, from this division, that it may be neither possible nor desirable to lay down any strict rules as to what particular acts of dis-

honesty should render a barrister liable to disbarment; the discretion is and must be left with the governing body. It would, however, be well if some understanding were come to as to what acts which border on dishonesty, such as insolvency, and also acts of the nature I have before alluded to, should be considered within the category; not, of course, as a matter of warning, but rather for the guidance of those who have charge of the discipline of the Bar. As there is no record kept by the benchers (open to the public at least) of the cases which have come before them, and in which they have exercised their discretion of disbarring, and as no publicity is given to their decisions, no precedents can be appealed to on the subject, except in the few cases where attempts have been made to get the interference of the Queen's Bench by *mandamus*. In *Boorman's* case, a barrister of one of the Temples was expelled the house, and his chamber seized for non-payment of his commons; a course which, I conceive, would hardly be followed now.

With regard to breaches of etiquette, however, I cannot but think the question is very different. It being conceded that the etiquette of the Bar depends upon the rules which custom or expediency requires should be maintained, but the breach or non-performance of which is not in itself matter of dishonesty, it follows, almost as a matter of course, that they should be accurately defined and laid down for the guidance of all, but especially of men just commencing their career. As I have already pointed out, such is not the case; they remain to this day the unwritten laws of the profession, handed down from generation to generation, and altering materially with the custom, practice, and convenience of the Bar. There are certain leading rules of etiquette which have, from long practice, become well known and defined, but there are many others which are ill-defined and ill-kept; some are falling into neglect, others gradually rising into practice.

Much uncertainty prevails with respect to many of them, and the highest authorities differ on points of daily occurrence.

Of the most important rules of etiquette are those which affect the relation of the barrister to the attorney. These cannot be better illustrated than by the judgment of Lord Campbell, in the well-known case of *Bennett v. Hale* (15 Q. B. 171), where a judge, having ruled at *nisi prius* that a counsel appearing for one of the parties, and not instructed by an attorney, could not cross-examine witnesses or address the jury; the whole question was discussed, and a new trial was granted, on the ground, "that though there was an understanding in the profession that a barrister ought not to accept a brief in a civil suit, except from an attorney, and the Court believed that it was for the benefit of the suitors, and for the satisfactory administration of justice, that this understanding should be generally acted upon, yet there was no rule of law by which it could be enforced; that it being a matter of procedure, the judges, of their own authority, might, according to their view of what was fit, have laid down a general rule, determining under what conditions and restrictions barristers should be permitted to plead before them and have pre-audience, but that no such rule was to be found; that in Criminal Courts it was conceded that the practice for a barrister not to plead, unless instructed by an attorney, did not prevail; and that instances were well known in which, with the sanction and at the suggestion of judges, barristers had defended prisoners without the intervention of an attorney."

With regard to the ancient practice, Lord Campbell pointed out that a change had been taking place in the relation of barrister and attorney: "That the advantage to be derived from subdividing the business of conducting a suit, and having two orders in the profession of the law between whom it should be distributed, became more and more felt; but for a long time the attorney only sued out process, and did what



was necessary in the offices of the Court for bringing the cause to trial, and for having execution on the judgment. That he highly approved of the demarcation finally drawn between the functions of the attorney and those of the counsel, and believed that the intervention of the attorney between the counsel and the party had greatly contributed not only to the dignity of the Bar, but to the improvement of English jurisprudence. He earnestly trusted that the almost uniform usage which had prevailed upon the subject for more than a century would not be altered, and that the interference of the judges to rectify any abuse of it would not be necessary. Exceptional cases might again occur, though very rarely, when it might be fit for barristers to plead in civil suits, instructed only by the parties; but he hoped that they would continue generally to adhere to what had been considered the etiquette of the Bar. Although conscientiously bound, and ever ready to render their best assistance for the discovery of the truth and the vindication of right, they were at liberty, under the control of the Courts, to lay down conditions upon which, for the public good, their services were to be obtained."

From this judgment it seems that, in Lord Campbell's opinion, though there was no rule of law to prevent barristers appearing in civil cases uninstructed by attorneys, yet it was against the etiquette of the profession. The judgment, however, does not touch upon the question of chamber practice, and it is difficult to say whether, even in civil suits, the etiquette is still as pointed out by Lord Campbell, for it will be recollected that when the County Courts were first established in 1846, a clause was inserted (9 & 10 Viet. c. 95, s. 91) preventing counsel from appearing in these Courts unless instructed by an attorney; but, subsequently, in consequence of an agitation among some members of the Bar, and very much owing to the exertions of this Society, and the support of Lords Brougham, Lyndhurst, and Denman,

when the jurisdiction of the County Courts was extended from £20 to £50, this clause was repealed. This would seem to indicate that, in the opinion of the Legislature and of the noble lords just named, it is not expedient that in the County Courts, the etiquette of being instructed by an attorney should be maintained, and it is not easy to draw a distinction with regard to the Superior Courts, and much less so with respect to chamber-work. Notwithstanding this, it is certainly the opinion of a large number of the profession that it is contrary to etiquette, and, indeed, in the opinion of many, dishonourable to take briefs from, or to advise, or to receive fees from others than attorneys.

The practice, such as it is, is comparatively modern; for up to quite a late period of our legal history even the minutest part of the duties connected with it were performed by barristers, and it was not till the year 1557 that we find the rule, already quoted, forbidding barristers to act as attorneys, and it is about that time that we must look for the complete divergence of the two professions; but even much later than this the attorney was a mere ministerial officer performing the less important duties of conducting the suit through the forms of the Courts, and all the more important duties were undertaken by counsel, who advised personally with their clients. It is quite of late years that the attorneys and solicitors have assumed the important position which they now hold, and that they have become, in fact, the dispensers of all the business which comes to the Bar. There is, no doubt, much to be said in favour of cutting off the barrister from direct personal communication with the client; it tends to make the barrister more independent of personal questions, enables him to give a more impartial and unbiassed opinion, free from the prejudices which might, perhaps, be instilled into him by more direct intercourse with the client. To men in heavy business, the work comes already half-performed, in being divested of all immaterial matter which

the client is certain to impart to it. It would, indeed, be impossible for a leading barrister to receive his instructions from clients uninstructed in the law; the waste of time in explaining would be too great. There are, however, consequences of an opposite character arising from this rule, which have an important influence on the counsel. I mean that it tends to make the professional prospects of the barrister too much dependent on attorneys' connexion. Of course there are exceptional cases of remarkable talents, which command success, in spite of every difficulty; but, on the average, an early introduction to easy business and familiarity with its forms are almost indispensable, and the opportunities which give rise to these advantages rest mainly with the attorneys, and not with the public; and it is neither unnatural, nor can it be said to be unjust on their part, if these opportunities are given in the first place to relations or connexions of their own whom they know, in preference to strangers whom they do not know. There are not a few great firms of attorneys in the present day who have of themselves sufficient business to support a barrister with work, and it sometimes happens in such cases that a close connexion exists between the firm and the barrister, having its origin in family ties, which has all the appearance and some of the effect of a partnership, the reality of which would be opposed to the principle on which the Bar rests, and contrary to every rule of etiquette in the profession; so true is the old saying, "*Naturam expellas furcâ tamen usque recurrit.*" There are others, however, whose boast it is to pick out the best men they can find at the Bar, regardless of other considerations, and by so doing to contribute in raising them to the bench and even to the woolstack.

Then, again, the attorneys are not themselves restricted from performing the duties of counsel, except before the Superior Courts. In many other Courts, and in many other ways, they practise side by side with barristers, and have

obtained almost the whole of certain branches of work. Almost all the County Court work, which now embraces a considerable quantity of important litigatory work, almost all the Bankruptcy work, a vast proportion of conveyancing, of work before Judges in Chambers, before the Clerks of Chancery Judges, before Masters of the Courts, in references, and at petty sessions—most of it strictly the work of advocates—is performed by attorneys, and without the aid of barristers. It would be a folly in these latter to abdicate any further their proper functions, unless it can be distinctly shown that it is for the interest of the public that such work should be taken from them and entrusted to others. It has been feared by some that if it were proper for the counsel to advise his clients without the intervention of an attorney, and for the latter to be called in when litigation was commenced, it would lead to the counsel naming the attorney instead of the attorney naming the counsel. This is so to some extent in France, where the advocates invariably see their lay clients and where the local Bar in the provinces derive much of their emoluments, by giving advice to their neighbours without the intervention of the *avoué*. It does not appear that any evil consequences follow, or that the Bar is at all lowered in the estimation of the public, or in any of its qualities as compared with our own.

The subject is one of great interest and importance, but cannot now be treated in all its bearings. I have only introduced it to show how important it is that it should be discussed by the Bar generally, and that some rule should be adopted, founded on what is thought to be the interest of the Bar and the public, which I conceive will ultimately be found to be the same. Far from any certain rule at present being laid down, I venture to say that no two benchers, taken at random, will agree as to what are the rules of etiquette regulating their relations with attorneys, and I cannot find that the Inns of Court have ever taken pains to lay down what

should be the conduct of their members. There is, it is true, an Act\* which gives attorneys a monopoly in their own department of practice and protects them with penalties, but it does not point out what their special duties are; they doubtless include serving notices, taking out process, and other similar duties, and perhaps they extend to collecting evidence, copying documents and drawing up the briefs.

I need hardly say, that it is a strict rule of etiquette, and one that would be observed by all men of right feeling, whatever the etiquette might be, that a barrister may not solicit briefs. In criminal cases it is against etiquette to undertake a defence for a prisoner gratuitously or without the intervention of an attorney, except on application from the prisoner in the dock, or by invitation of the judge. The rule might perhaps with advantage be further relaxed, in consideration of the number of cases in which prisoners or their friends are unable to afford the expense of an attorney. That the rule is not invariably kept is apparent, from the complaints which have found their way into the public papers from the Middlesex Sessions of an alleged practice there, of barristers' clerks touting among prisoners and prosecutors, and drawing up briefs for their masters without the intervention of an attorney; and the practice has given rise to much scandal, arising from the angry recriminations of counsel. We have not, however, heard of any attempt being made to inquire into the origin and extent of such a practice.

At the French Bar the rule laid down is, that "It is unworthy of an advocate to solicit business unless in the case of a defence, which he may offer gratuitously to the poor." The advocate is further permitted to have free intercourse with prisoners in the gaols, but he is forbidden to have anything in the nature of an understanding with gaolers or prison agents.

Another rule of etiquette of great importance is that which

\* 2 Geo. II. c. 23.

has reference to the contract between the barrister and his client. In the recent words of Chief Justice Erle, it may be stated thus: "That a barrister may not, by a special contract, made either before, during, or after litigation, bind himself or his client in respect of such litigation." After the decision of the Common Pleas, in the case of *Kennedy v. Brown*, it must be taken that this is not only matter of discipline but matter of law, and that no action can be brought by either counsel or client upon any such contract.\*

The judgment of the Chief Justice, apart from precedent, proceeds upon the ground that "If the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his per-

\* By the rules of the French Bar, as drawn up by M. Mollet, and circulated by the Council of Discipline among their members, it is thus laid down:

"In the presence of ingratitude, which, unfortunately, is too frequent, and ever ready to take every advantage, it is difficult to form any prohibition; and there is no doubt that, in law, an action for the recovery of fees would be maintainable by an advocate. This was an express disposition of the Roman law, and there exist many similar orders of the Court of Appeal. Certain Bars indeed authorise, or at least tolerate it; but in Paris, the rule of the ancient Bar, founded on the disinterestedness which was its characteristic, and according to which any judicial demand of payment of fees was strictly forbidden, under pain of erasure from the table (disbarment), has been religiously preserved. This honours the advocate in the highest degree; it makes his profession unlike any other, and assimilates it to a kind of magistracy. Hence this principle arising from tradition, that the payment of fees must be voluntary on the part of the client, and, as it is said, without the tax or intervention of the Judge."—See "Mollet, Règle de la Profession," 141. See "Anciennes Lois Françaises," tome i., p. 662, xiv. p. 419, and "Ordonnance," 14 Dec., 1810, sec. 17.

As to the Scotch law, see Lord Bankton, 4, 3, 4, who also, on authority of the Roman law, lays down that an advocate may sue for his fees, but that it is dishonourable in him to do so. But see Shand's Practice, p. 81. The Roman law depends upon the interpretation of certain passages in the Digest, lib. 50, lit. 13, art. 5, 10, and 12; and I find it impossible to reconcile that of the Court of Common Pleas with that of previous commentators. See the translations of the Pandects by Pothier and Neuville, and by Hulot and Berthelot; by whom the words *si cauta honoraria* are rendered, "if the fees be agreed upon," and not, as by the Common Pleas, in the sense, "if security be given for the fees." See also Grellet Dumazeau sur le Barreau Romain, p. 127. The words "*Honoraria honeste accipiantur tamen inhoneste petunter*" would seem to indicate, not that fees could not be sued for, but that it was dishonourable in advocates to sue for them. A distinction which is followed in the French law.

formance would be guided by the words of his contract rather than by principle of duty; that words sold or delivered according to contract, for the purpose of earning hire, would fail of creating sympathy and persuasion, in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates might be degraded. It may well also be, that if contracts for hire could be made by advocates, an interest in litigation might be created contrary to the policy of the law against maintenance, and the rights of attorneys might be sacrificed, and their duties be imperfectly performed by unscrupulous advocates; and these evils, and others that may be suggested, would be unredeemed, by a single benefit, that we can perceive."

The decision is a most important one; independent of the high tone which it takes, it makes it clear, for the first time, that there is no remedy, by action at law, against a barrister, even in the case of an express contract, unless there be *mala fides*, thus overruling what had been previously considered as the law in a judgment of the Court of Exchequer in *Swinfen v. Lord Chelmsford*,\* where it was said: "Upon an express agreement, the barrister would, no doubt, be liable, as any other person or party, to a contract." Again, "We are of opinion that an advocate at the English Bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract expressed or implied. Cases may, indeed, occur where he would be liable in *assumpsit*; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client, but the Court in which the duty is to be performed, and the public at large, have an interest."

I have dwelt upon this, because, though it is matter of law and not of etiquette, it is well that it should be clearly under-

\* 5 Hurl. and Norm. 921.



stood that the public cannot look for any remedy for breach of contract or duty by the ordinary form of action at law, but must look to the Bar itself to maintain its own sense of duty to the high level pointed out by Sir W. Erle, in a judgment, of which, in some parts, one is tempted to say in the words of Molière,—

“ Cette grande raideur des vertus des vieux âges  
Heurte trop notre siècle et les communes usages ;  
Elle veut aux mortels trop de perfection.”

When we look at the present practice of the profession, we certainly do not find that entire absence of pecuniary interest, and of anything in the nature of hiring and services, or of bargains between counsel and client as to fees which was the boast of the Bar in times when, by a curious conceit, in imitation of the Roman *patroni*, our barristers wore a purse hanging from the backs of their forensic costume, into which the client might, unseen, put his fee, lest they should be tainted by the handling of money and the discussion of terms; the vestiges of which custom are still to be seen in the purse hanging from the barrister's gown. Whatever ancient rules of etiquette there were on this point have disappeared; counsel, in nine cases out of ten, do not receive their fees beforehand, notwithstanding an ancient etiquette to that effect, (see Bayley J., in *Morris v. Hunt*, 1 Chitty, 544,) “Counsel are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not. It is their duty to take care that they get them beforehand, and the law allows no remedy if they disregard their duty.” It is now a common practice for the clerks of counsel to run up accounts with attorneys for their fees. And again, on the important question of the amount of the fee, it is hardly necessary to state the fact, that the practice has grown up, if indeed it ever was absent, of what amounts to a bargaining between the clerk of the counsel and the attorney as to the fee the counsel will require with the brief; and the client

well knows that if the best man will not take the brief for the fee, which is all that he can offer, there are others, who hold second rank, who will be quite willing to do so; and thus competition of the most unlimited character virtually takes place. I am unable to see how these facts are inconsistent with the highest moral sense of duty in counsel, or the utmost devotion to the interests of their clients, or with the independence and disinterestedness so much to be aimed at. The same can, perhaps, scarcely be said of that which has become not uncommon in recent times, which has been much commented on in the press, and for which the Bar has suffered some unmerited censure. I allude to the increasing tendency of counsel to hold more briefs than they can conveniently give attention to. No doubt great difficulty has arisen from the multiplication of Courts at Westminster and Guildhall, from the judges often sitting at both places at the same time, from the increase of business, and from the manner in which business is brought on in the Courts, making it all but impossible to predict with any certainty when particular cases are likely to be tried. Then, again, the judges take no cognizance of what is going on in other Courts, and rarely postpone cases for convenience of counsel engaged elsewhere; and it often happens that counsel who have but a small business find two or three cases coming on at the same time in different Courts; and much more is this the case with men in larger practice. Cases are often not tried till weeks and months after the briefs are delivered; and it happens also that attorneys often press upon counsel a brief with the knowledge that he will probably be unable to attend to the case, and the brief is often handed over to another counsel with the full consent of the client. In other cases, counsel are retained and briefs delivered with the sole view of preventing them from appearing on the other side, on the principle, it is to be supposed, that "speech is silver, but silence is gold." But making every allowance for these, and it is still impossible to deny that cases

have occurred in which clients have a right to complain, where perhaps they have found neither of their counsel in Court when their case is on, or the places of one or more of them supplied by others who have neither advised nor consulted with them in the case; it is obvious that one such case does more injury to the reputation of the Bar than years of devotion from the great body of the Bar, and gives rise to a complaint that desire for gain rather than a sense of duty are its characteristics. It is truly said that the evil bears its own cure, for if cases are neglected the counsel will lose his client, and clients are more easily lost than gained; but this of course is poor consolation for the sufferer.

Another common defence made for this practice is, that in accepting the brief or fee, the counsel does not absolutely promise to attend to the case, but only to do so if he finds himself able with reference to other business which he has in hand, and that the attorney well knows this, and does not expect the counsel to do more than attend to the cases he may have, as their relative importance requires—an excuse which is based on the supposition of a contract between counsel and attorney; and not on the high theory of duty laid down by the Chief Justice. The ordinary duty implied in taking a brief, must be to hold it, to do the work, and not to give the client an expectancy, or to hand the brief to another. If the Bar were like other professions and trades, and its members were answerable for negligence or for breach of contract, no question could arise upon such a practice, because the advocate who did not attend would, unless some such special contract could be shown, be liable to the consequences of his neglect, and would probably have to pay the costs of the day incurred by postponing the case, if the client did not choose to go on without him, or to adopt the substitute.

The same complaints were formerly made of the Chancery Bar; till, by an arrangement among the leading counsel, who restricted themselves to certain Courts, the practice was

put an end to ; but on account of the accident of the unequal distribution of business between the three Vice-Chancellors' Courts, this was found to be not without hardship to some of the counsel who were parties to it, and the agreement, I am told, has been put an end to, though most of the leading counsel still confine themselves to particular Courts. It is still more doubtful whether by any rule or understanding of this kind at the Common Law Bar, it would be possible to put a stop to what has been alluded to ; but it is almost certain that if there was a really efficient council of discipline open to clients who conceive they have reason to complain of their counsel, we should hear no more of such cases or of the remarks to which they give rise. As it is, it cannot be wondered at that the public, when informed of some of the rules of etiquette, and finding none upon this point, are apt to say that the Bar is straining at gnats and swallowing camels. Among the rules of the French Bar there is one which says, "An advocate should never accept too great a number of causes ; if this surcharge does not indicate avidity, at least it overpowers and stifles talent."\*

At the Common Law Bar when briefs are handed over by counsel to others, and the practice is not without its advantages in presenting opportunities to younger men of gaining experience and clients, it is against the etiquette, I believe, to hand over any part of the fees. At the Chancery Bar, where it has become the practice for men in heavy business to send their chamber-work to juniors, it is usual to give with them half the fees marked on the briefs. Again, at the Parliamentary Bar, where, more than elsewhere, the practice has grown up of counsel holding briefs at the same time in many cases, and where, from the peculiar nature of the work, it is almost impossible that it could be otherwise, there is a very strong feeling against counsel handing over the briefs to others to hold for them, and it is seldom, if ever, done.

\* "*Règles de la Profession d'Avocat.*" Par M. Mollet, R. 14.

Another rule of etiquette is that a counsel is bound to take a brief offered to him. I believe there are a few barristers who are Quixotic enough to consider that under this they are bound to take the brief, whatever the fee may be ; but whatever the etiquette may have been in former times, the practice now is, as far as I have observed, that of the barristers' clerks looking to the fee or to the name of the attorney on the back of the brief, and being guided by these as to whether they will take the brief.

The really important part of the rule appears to me that which binds a barrister to take a brief without reference to the merits of the case, provided he be satisfied with the fee ; so that every case, no matter what its merits, should have its advocate in open Court and have the opportunity of being heard to the best advantage. At the French Bar, where the rules are better defined, if not stricter than with us, it is different ; the barrister there is bound to exercise his discretion as to the facts of the case, and is not to appear in a case which he knows to be bad.

“ In civil matters, if a cause appears to be bad or unjust, an advocate will decline it without hesitation, even should he have advised thereon or accepted it under error.”\*

It is needless to say that the French Bar is in every way as distinguished as our own for independence and disregard of consequences, and has been so under governments often despotic, and presenting difficulties and even danger to their personal and professional well-being, far greater than ours has ever had to bear ; but it is still a question whether the rule of the English Bar on this point is not the better one.

Again, there is a rule of etiquette, that fees under a guinea for a junior and two guineas for a leader shall not be accepted by the profession, thus fixing a minimum—a minimum which is so low as not at all to affect the leaders nor even the juniors in civil cases, as it is rare indeed to see a brief in

\* Molot, R. 38.

a civil case with a fee less than two guineas. But it is otherwise in pleadings and in criminal cases at Sessions and at the Old Bailey; in these the greater number of briefs are marked with no more than one guinea, at which the cases are certainly not underpaid. I am told it is notorious at some of these criminal courts, that there are barristers who are in the habit of taking fees of less amount than the recognised guinea, and who either take briefs in the lump for a smaller sum, or, having their briefs marked with the guinea, receive something less. I need hardly point out the dishonesty of thus pretending to adhere to the rule, and, *sub rosa*, defeating it; but it is worthy of consideration whether the majority of criminal prosecutions and defences are not over-paid at one guinea, and whether it would not be well to do away with or to alter such a rule. It would, perhaps, be said you will let in competition, which will destroy the *morale* of the Bar. Competition has, as I have shown, its full effect upon leaders at the Bar and others for a maximum, and there is no reason why, in principle, it should not be also allowed as to a minimum; and the *morale* of the Bar at the Sessions, where such practice referred to is carried on, is more injured by the rule than it could be by its absence, for it has the effect of taking the smaller work from the hands of those who cannot secretly do what openly they may not do, and has put it into the hands of the less scrupulous. To most men who go to Sessions, or undertake criminal work, the fee is matter of small consideration indeed; it is the practice, the opportunity of speaking in Court, of examining and cross-examining witnesses, which they seek, and by which they hope to rise into better business: and if it were the recognised rule that sums under a guinea might be taken, there would be no compunction in honourable men taking the lesser sum. There is a large amount of chamber work in the nature of pleadings, done by special pleaders, men who, though just below the Bar, are generally on their way to it, and who are not above

taking half-guinea fees; and there is no reason why this work should not also be open to them and others when called.

At the Parliamentary Bar, which, in many respects, is very different in its practice and etiquette to other branches of the profession, and which much more nearly approaches to a free profession, the minimum fee for both leaders and juniors is fixed at ten guineas per diem, and five guineas for a consultation. These fees were probably fixed at a time when cases before Committees were few, and it was necessary to tempt men away from other work by high fees. Now that the business is so considerable, and a numerous Bar has been formed who do little other work, it would be better, both for the public and the Bar, if the amount of these refreshers were left, as the fee on the briefs, to be settled by arrangement between counsel and client. The fees on the briefs are low in proportion to the refreshers, which is at variance with what is the case at other Bars. It is possible that the often needless length of the inquiries has some reference to this fact.

Another rule of etiquette which affects barristers on circuit is, that a barrister having chosen his circuit, must not, after three years, remove to another, and may not accept a brief on another circuit except for a special fee of 300 guineas for a leader, and 100 for a junior, and 50 in a criminal case. The rule is grounded on the principle of prevention of competition. It is with a view to keep circuits distinct, to protect those who have secured a certain status from the inroad of dangerous rivals, and to prevent the inroad of barristers upon small circuits to carry away the large prizes, and so forth. The amounts of these special fees were probably fixed at a time when the expense of getting from one part of the country to another was great, and much time was lost on the way. There is little to be said in favour of such rules at the present time. They are framed with little regard to the public, whose direct interest it is, to have the most ample choice of men,



and at the smallest fee for which they can be induced to undertake cases ; and still less are they in the real interest of the Bar, who are yet more concerned in having the largest field open for their professional careers. Of the same nature are rules prohibiting barristers from travelling in coaches or stopping at hotels, which seem to have been framed to create needless expense, or were made in times when there were fewer family ties than now between barristers and attorneys, and are out of date in these railroad days.

A rule of etiquette that barristers shall not refuse to hold briefs with one another, and shall not attempt to interfere with the attorney's choice of junior or leader, is one which is beyond criticism, and is, I believe, universally observed.

There are other rules of etiquette relating to precedence, which are by no means unimportant, with reference to the general organization of the Bar, and with reference to a very important question as to the appointment of Queen's Counsel. It is against the etiquette for a barrister to hold a brief as junior to one who was called after him. It is the etiquette for a leader to have a junior to him in all cases in which he appears for the plaintiff in a suit, but not so when he is instructed for the defendant. I will only mention that there has been some tendency to a departure from the rules as to precedence of juniors in the freer practice of the Parliamentary Bar, but without any notice being taken of it by any of the Inns of Court.

Besides these rules to which I have adverted there are many others which I have not adverted to, as presenting no subject of remark or objection ; there may be others of which I am not aware, for there is nowhere to be found any written collection, nor is there any publication which takes notice of rules of the Bar. Nor can I find that the Inns of Court have ever defined or collected them for the guidance of their members.

It is among the younger members of the Bar—among those

just pushing into business at Sessions, and at the smaller *nisi prius* Courts, that the greatest care should be taken in enforcing those rules of etiquette that are considered to be really essential to the dignity of the profession and the protection of the public ; for it is at this stage of their practice that their professional habits are formed, and also it is generally for the purpose of getting an attorney connexion that breaches of etiquette are contemplated ; when this is formed, the counsel who has risen thereby is only too glad to keep to the rules, and to enforce them against others who are following his example. Though the profession is full of the most honourable men, and of men of the highest order of intellect, yet it cannot be denied that, from the days of Scroggs, Trevor, and Jeffreys to those of Edwin James, there have been cases in which men unincumbered with scruples have risen in it ; and it must be borne in mind that to be known as an unscrupulous counsel, insures of itself a certain amount and class of business ; for it is often convenient to men of the same feather among the attorneys to shelter themselves behind the opinion of a barrister, and they naturally look out for one who understands a wink or a nod. Rules forbidding actions not in themselves wrong, or enjoining a particular course which would not otherwise be adopted, will, if they are not strictly enforced, become obstructions only to scrupulous men ; to the unscrupulous they present no difficulties ; on the contrary, they offer means of advancement. It is for the sake of men who would avoid even the slightest approach to anything which might be considered as a breach of an honourable understanding in the profession that all rules which are really necessary should be enforced. It is on the same principle that I would urge that the rules of etiquette should be as few as possible, and that all rules at present existing, which cannot be supported on good and sure grounds, should be abolished. In the words of Lord Denman, “ we may safely lay this down as a rule, that all interference of authority with the freedom of actions, not in them-

salves wrong, is to be avoided as an evil, and one that most commonly aggravates whatever evil it was designed to correct. The *forum domesticum*, to which the profession paid allegiance as a band of brothers, can hardly maintain its authority over a family so widely diffused, so indefinitely multiplied. Without rules the honourable man will act correctly, and none will restrain those of opposite character." \*

Now, it certainly would seem to be desirable that the governing body of the Bar should have some discretion vested in them of amending or altering the rules of etiquette, of abolishing such as are no longer of any use, and, perhaps, of establishing new rules. But under the present constitution of the Inns of Court that would be impossible. They have no such power; the utmost they can do, individually, is to take no action upon the breach of a particular rule. They have no common union; each is a separate and distinct body. I cannot ascertain that the benchers of the various Inns systematically, or from time to time, examine into the practices which are growing up at the Bar, or exercise any regular supervision over the conduct of their members. It is not, so far as I am aware, the duty of any one bencher in particular to collect information; and where, as in the case of Lincoln's Inn, there are upwards of sixty benchers, what is anybody's duty becomes nobody's duty.

I cannot ascertain that it is the course for the benchers of the Inns to entertain or receive any complaints of their members from the public or from clients who have reason to complain of the conduct of their counsel. With the French Bar the rule is thus laid down:—"The ministry of the advocate being independent, he is no more responsible for his opinion than the judge for his sentence; he is neither liable to disavowal or exposed to an action for damages. The client can only question the conduct of his counsel before the council of the order." †

I have now described the nature of the government of the

\* Letter to *Law Review*, vol. xvii. p. 69.      † Mollet, Règle 57.

Inns of Court, the authority which they exercise over their members, and the nature of some of the rules of etiquette. I think there are few who will not agree with me in the conclusion that, as now constituted, the Inns of Court are unable to effect that which is their principal object—the maintenance of discipline among their members.

It has been seen that they have not established any standard of professional knowledge in members on their call to the Bar. They do not systematically enforce such rules of etiquette as are certain, or ascertain and make known the less-known rules; while in the cases which do from time to time come before them, there is not that security which there ought to be to the Bar and the public, that the cases shall be fully and properly investigated. And, again, the fact that there is no unity of action between the four Inns, and nothing like a representation of, or special responsibility to the general members of the Bar, militates greatly against the use which they might make of their position. A great want of the Bar, as now constituted, is some body which shall represent their interests in the numerous subjects which from time to time arise affecting them; such, for instance, as the legal education of the Bar—one of the most important subjects, which has only been alluded to in this Paper; the concentration of the Law Courts, on which it would be most desirable that the opinion of the Bar should be taken and expressed; the re-distribution of circuits, a question which is most urgent, and which seriously affects the interests of one half of the profession; and, lastly, upon all those questions of etiquette which I have already alluded to.

It has been proposed to substitute a central body, chosen by the benchers of the separate Inns,\* on the plan which has already been tried in the Council of Education, the result of which cannot be said to augur much energy or

\* A bill has been brought into the House of Commons by Sir George Bowyer with this object, and the Solicitor-General has intimated that the Inns of Court themselves are contemplating some movement in this direction.

success; but although a council thus formed would consist of men of the highest position in the profession, and would remove many difficulties now existing, such as the want of unity of action and concentration, yet it would still be open to the objection of not representing the great body of barristers, and of remoteness from the scene of operations of most barristers, and it would be unable to deal with rules of etiquette as suggested; I cannot, therefore, but think that it would be better to adopt a system founded rather on the example of the French Bar. Barristers in France are not, as with us, concentrated at its capital; in every town where there is a tribunal or court of appeal, with business enough to support a Bar, there is established a distinct society of advocates, each having its separate government and discipline—but they are all modelled upon the same plan and with the same rules, and an advocate practising at any Court in France, inscribed on its tableau, is free to hold a brief at any other Court.\* The Bar of Paris, which serves as a model for the rest of France, is governed by a council of twenty-one members, elected annually by the whole body of advocates inscribed on the tableau, and presided over by the batonnier, who is also elected by universal suffrage for two years.

The council thus formed has under its control the discipline of its members, and is able to warn them, to reprimand them, to suspend them from practice for not more than one year, and to disbar them; it has also the power of ordering restitution of fees. From the decisions of this council a collection of rules has been made which is circulated among members of the Bar, and which is an authority upon all matters of etiquette.

\* The Court de Cassation at Paris, the court of last appeal from every other court in France, is an exception to the rule; it has a special limited Bar of its own, consisting of 60 advocates, who have exclusive audience there, and are not permitted to practise elsewhere. These advocates are permitted to sell their places, and large sums are given for the right to practise in this court. They have an organization and discipline of their own. Although they embrace among their members men of great ability, yet the best men of the profession, the Berryers, and the Jules Favres are to be found, as might be expected, in the more open competition of the lower courts.

These rules are framed upon the same principles and with the same intent as the better part of the unwritten, half-known rules of our Bar, and are more strict only in the sense that they are better defined, and more carefully enforced. As such, they are well worthy of the consideration of our Bar.

It would be quite possible, and I believe advisable, to organize a council for the Bar of England upon a similar plan to that here described. Some difficulty might arise from the great number of members of which the Bar is now composed; but it must be recollected that though more than 4,000 names are inscribed as barristers in the *Law List*, and are members of the Inns of Court, no more than 1,500, at the outside, can be called practising barristers in the sense that they go circuit or occasionally attend the Courts with or without briefs.\* Of these the larger half are at the Common Law Bar, and for the most part join a circuit. It would be feasible to form a council, the members of which should be chosen in part by barristers practising in the Chancery Courts, and in part by those attending each circuit—say, one or more representative from each circuit, from each Court of Chancery, from the Parliamentary Bar, from the Divorce Court, and from the Old Bailey, barristers having liberty to inscribe their names at which Court they prefer for the purpose of these elections.

A council thus formed, and electing its own president, should be entrusted with all the duties which are now in the hands of the Inns of Court, and should have absolute control over the admissions to the Bar and the discipline of its members, subject, as now, to an appeal to the judges. It would be proper that they should have definite times for meeting, and should be held responsible for the conduct and government of the Bar. They might, further, be entrusted with power to

\* There are 4,260 names in the *Law List*; of these 1,501 are marked as members of circuits, or as having chambers near the Inns of Court; a further deduction of at least one-third must be made in respect of men who are not in earnest pursuing the profession; of the remaining 1,000, I doubt if there are more than from 400 to 450 who are making, by their practice at the Bar, an income, say, of £500 per annum; of course many of these are making considerably more, and some few are realizing large fortunes.

ascertain what rules of etiquette are now in existence, and, at all events, their decisions might form precedents for the future. These rules should be as simple and as few as possible, as consonant with general principles of free action for barristers as is possible, having regard to their *status*. I venture to think that the council should not have power absolutely to disbar a member, but that this power should be vested in the judges on application and prosecution of the council; much as the power of striking attorneys off the rolls is now exercised by the various Courts; but that the council should have power to conduct a preliminary investigation, with a view to instituting such proceedings, and should have the power of calling witnesses and examining them on oath, of taking depositions, of causing production of documents, of questioning members called before them, and should have all the privileges of a subordinate court of justice. The council might be further assisted by smaller councils, chosen by the different Circuits and Courts, and presided over by the members representing the Circuit or Court in the head council, and reporting through them. These smaller councils should determine on all the minor cases, subject to an appeal to the head council.

It may be asked what right has the Bar, as a body, to enforce a discipline among its members, to inquire into their conduct, and to lay down rules for their guidance; the answer is, that it is not a right but a duty, which is founded on the privilege which the Bar enjoys of an exclusive audience in the Courts of Law, and of immunity from actions against their members for breach of contract, or for ignorance, negligence, or mistake. It is these on which the whole foundation of the Bar rests, and which render the profession so different from any other. As long as these are their privileges, it is their bounden duty to offer some guarantee to the public that honourable and trustworthy men only are members of the profession; that the further privileges of speech and cross-examination of witnesses will not be abused; that they are individually worthy of confi-



dence; and that such rules as are necessary for the maintenance of the order and for protection of the public will be kept. I may go further, and say that they are bound to provide some test, so that ignorant and ill-educated men will be unable to obtain entrance to the profession. If it were not for these privileges and immunities there would be no such duty cast upon the members of the Bar.

Let it be remembered that there are not wanting those who consider that the organization of the Bar is, in itself, abnormal and unwarranted by true economical principles. It is urged that there is no good reason why the Bar should be separated as it now is from other professions, whether cognate to it, as that of attorneys, or not, protected by immunities, endowed with privileges, and intrusted with duties. They would advocate throwing open to any person whatever the right of addressing the Courts, either on his own or any other person's behalf. That the feeling of the age and the Legislature, with regard to other professions and trades, is in favour of such a course. That the profession is of no greater importance than many others which are not protected. That there is no intelligible reason why barristers should not be responsible, for all other professional men are bound to possess the degree of skill necessary to manage the business they undertake with safety to their employers. That as to the question of payment, which is correlative to that of non-liability, there is no reason why the ordinary laws of supply and demand should not regulate it, and that a barrister is not degraded by making a bargain as to the fee to be paid him any more than any other professional man; and that practically it is so, and has been so ever since the Cincian law fell into disuse. That there is no fear of the business of the Bar falling into the hands of ignorant men, as it is work of the highest order, and it is only by great study and long practice that men can render themselves fit for it; and that the Bar rests on no such flimsy basis as that it is liable to have its business at any moment taken away from it by opening the doors of the profes-

sion. That the public is the best judge in this, as in any other profession, of whom they will employ; and that the experience of other professions shows that the public will not employ either ignorant or dishonest men. That there is no reason why a dishonest man should be by public law prohibited from employing his talents in the way which he best can, so long as he can find persons who will employ him. That any rules for discarding dishonest men in a large profession become of necessity inefficacious, only tend to lull the public into a fancied security, and that it is impossible by artificial means to raise the tone of the morality in any particular profession above that of others in the same social order. That if there are men outside the present profession who are fit and able to perform the work, it is neither right nor beneficial to the public that they should be debarred from doing so. That any rules, such as those fixing a minimum rate of fee, or for confining barristers to certain Courts and circuits, are attempts to keep up the rate of wages and to prevent competition, which are unworthy of the age, opposed to all true economical doctrines, and as ineffectual as they are unnecessary. That the only true course is to leave it open to both the barrister and the public to make such bargains as shall seem good to them.

The answer to those whose views are thus briefly and baldly stated, and who, relying on the soundness of the general principles of political economy, are averse to all artificial restrictions on professional employments, is, that to render these general principles applicable, we must abandon the high ground upon which the profession of an advocate has been placed in most countries, both ancient and modern, which have reached a high degree of civilization. That not only in England, but in Rome, and in those countries which have derived their law from the Romans, the *status* of an advocate has not been merely that of a man selling his legal knowledge and eloquence to his litigatory customer, but the advocate has been regarded—to use a metaphorical expression—as a priest in the Temple of Justice—as having duties of a grave and elevated

character beyond the interests of his clients, the duty of promoting the great objects for which laws are established, the protection of right, the redress and punishment of wrongs. That the regulations which form the discipline of the Bar, however imperfect they may be, or however insufficiently administered, have been decreed for a high and noble purpose; to preserve the honest independence of the advocate; to prevent him from being sullied by mercenary considerations; and to ensure that, in advising or defending his client, he should act as having a public as well as a private duty to perform. And further, in the words of Chief Justice Erle, "Looking to the power and privileges entrusted to counsel, it is of the last importance that his sense of duty should be in active energy, proportioned to the magnitude of these interests. If the law is that the advocate is incapable of contracting for hire to serve where he has undertaken an advocacy, his words and acts ought to be guided by sense of duty; that is to say, duty to his client, binding him to exert every faculty, and privilege, and power, in order that he may maintain that client's right, together with duty to the Court and himself, binding him to guard against abuse of the powers and privileges entrusted to him, by a constant recourse to his own sense of right."

The whole question thus suggested is of the highest theoretic interest, but is, in a measure, beyond the present inquiry. It must be obvious, however, that the answer thus given to the theorist is insufficient, unless it can be shown that there is within the Bar itself a power of enforcing discipline of its members, and of carrying out its rules, sufficient to prevent it from relaxing into the state of absolute freedom so much dreaded, and to supply the place of the legal consequences which would follow in other professions which have no such privileges and immunities.

In conclusion, I have only to say that it must not be supposed, because I have pointed out some of the weak points in the organization of the Bar, and have had occasion to advert to the practices of some of its obscurer members, that I would

either wish or venture to speak slightly of its members as a whole. I believe the Bar of England was never more full of men of the highest honour, probity, and learning. The generation has hardly yet passed away in which it gave us such men as Romilly and Brougham, Denman, Lyndhurst, and Campbell, and it has now among its ranks men who will be no unworthy successors to these. It would be idle in me to add to the noble vindication so lately made for the Bar by one who is himself an exemplar of all that is most eloquent, honourable, and dignified in the profession.\* If there have been some of late, of unenviable notoriety, who have, unfortunately, been permitted to rise to a high rank, which has cast a momentary shadow on the reputation of the Bar, it is owing, I believe, to a laxity of discipline, the result, not of want of principle, but of confidence and forbearance.

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ART. II.—THE RIGHTS, DISABILITIES, AND USAGES OF THE ANCIENT ENGLISH PEASANTRY.

PART VI.—*Taxation, Purveyance, and other Grievances.*

THE thirteenth century was a critical epoch in English history. It beheld the introduction of a number of constitutional changes. Up to that age the tenants had lived under their landlords, and were seldom reminded of their sovereign's existence. The government was chiefly supported by manorial assessments, and even the duties payable to the king—excepting irregular exactions, such as Danegeld—were rather seigneurial than regal perquisites. The ancient tallages were not abolished through the king's generosity: they had been levied by other lords, not by the king alone, and every king since the Conquest had been anxious to monopolize the power of taxation. A general tallage was apparently made

\* See the speech of Mr. Serjeant Shee, in the case of *Seymour v. Butterworth*.—*Law Magazine*, vol. xiv., part 2.

for the last time in the year 1220; its amount was two shillings upon each plough. In 1255 Henry III. proposed to raise Horngeld—a tax upon kine—but could not get the consent of his barons. Before the time of Henry III. a tax upon moveables began to supersede the tallage. The rate of the new impost varied: it was a seventh, a ninth, a tenth, a thirteenth, a fifteenth, a twentieth, a thirtieth, or a fortieth part of the value of all moveable property. We are told by the Burton annalist that England was *thirteenthed* in the year 1207. After a time the tax was called the “fifteenth;” a tenth being usually taken from the cities, and a fifteenth from the rural districts. In the year 1189, the declared object of the tax was to promote a crusade; in 1207, to recover Normandy; in 1224 and 1297, it was paid in return for the king’s confirmation of the charters; in 1289, for his expulsion of the Jews; but whatever the pretext of the levy may have been, the people were at first assured that it would be a temporary charge. In this respect it was like our blessed income-tax. There were certain exemptions: in the year 1232, persons with goods under the value of fifteen pence—in 1294, persons with goods under the value of ten pence—were not taxed. There were other exemptions, but they were hardly in favour of the rustic population.\* The return of the fifteenth of all moveables in the borough of Colchester and adjacent townships, for the twenty-ninth year of Edward I., comprehends clothing, bedding, linen, money, furniture, tools and utensils, wool, grain, suet, lard, firewood, seacoal, animals of the farm of all kinds, excepting poultry.† We may presume

\* Bartholomew Cotton, 178, 254. See also Harl. 1885, f. 75—The Chronicles of Roger Wendover, Thomas Wikes, and Walter Hemingburgh—The Annals of Burton and Waverley.

† Two or three entries may be translated from the Rolls of Parliament, 243—

Geoffrey Leyston had on Michaelmas Day 1301 i bed worth ii<sup>s</sup> ii young pigs worth xii<sup>d</sup> each. No other chattels.

Summa iii<sup>s</sup> Inde xv<sup>s</sup> iii<sup>d</sup> qū.

Nicholie Colbayn had . . . ii brass vessels worth xxv<sup>d</sup> i bed unsound worth ii<sup>s</sup> vi<sup>d</sup> i gown unsound worth v<sup>d</sup> i heifer worth iii<sup>s</sup> vi<sup>d</sup>.

Summa xiii<sup>s</sup> Inde xv<sup>s</sup> x<sup>d</sup> ob’.

that fowls were free, for we cannot believe that the people of Greenstead, Lexden, Mile-End, and West Donyland, had none of them in the year 1301. The fifteenth was considered a very great grievance. It was called a constant plague over-running England every year, compelling the poor to sell their pots and pans, cows and clothing, and bringing to the ground many who had been used to sit upon benches. It was often unfairly collected. The tax of 1268 or 1269 was not taken up until the next year had advanced, when the farmers, with empty barns and diminished stocks of cattle, were required to pay a percentage upon the goods which they had owned at the preceding Michaelmas. There was much fraud and embezzlement in the collection of this and the other duties, and much more was levied than ever reached the king. The wool-gatherers are said to have detained two or three stone of wool out of every sack.\*

Purveyance, or the collection of supplies for the royal household, was another hardship. Until the purveyors were compelled by Act of Parliament to take corn by stricken measure, they used to buy corn by heaps, and acknowledge it by strikes; and thus a farmer giving them twenty-five quarters

William the Miller had . . . in cash xiii<sup>s</sup> iv<sup>d</sup> in treasure i silver buckle worth ix<sup>s</sup> i ring worth xii<sup>s</sup> in his chamber i gown worth x<sup>s</sup> i bed worth iii<sup>s</sup> i cloth worth ix<sup>s</sup> i towel worth vi<sup>s</sup> in his kitchen iii brass utensils worth iii<sup>s</sup> viii<sup>d</sup> i andiron worth vi<sup>s</sup> i trivet worth iii<sup>s</sup> in his granary i quarter of wheat worth iii<sup>s</sup> i quarter of barley worth iii<sup>s</sup> ii quarters of oatmalt worth ii<sup>s</sup> a quarter ii pigs worth v<sup>s</sup> each ii young pigs worth xviii<sup>s</sup> each i pound of wool worth iii<sup>s</sup> faggots for firing worth ii<sup>s</sup> vi<sup>d</sup>.

Summa lxiii<sup>s</sup> iii<sup>s</sup>. Inde xv<sup>ss</sup> iii<sup>s</sup> ii<sup>s</sup> ob' qū.

Catherine Alman had . . . i bed worth ii<sup>s</sup> ii bushels of rye worth iii<sup>s</sup> ob' the bushel ii bushels of barley worth iii<sup>s</sup> ob' the bushel i cow worth v<sup>s</sup> i young pig worth vi<sup>s</sup>.

Summa ix<sup>s</sup>. Inde xv<sup>ss</sup> vii<sup>s</sup> qū.

\* Ore court en Engleterre de anno in annum,  
Le quinzyme denier, pur fere sic commune dampnum,  
Et fet aualer que soleyent sedere super scamnum;  
E vendre fet commune gent vaccas, vas, et pannum . . .  
Une chose est countre foy, unde gens gravatur,  
Que le meyté ne vient al roy, in regno quod levatur . . .  
Uncore est plus outre peis, ut testantur gentes,  
En le sac deus pers ou treis per vim retinentes.

(Wright's Political Songs. Camd. Soc. 183, 184.)

of corn was credited for no more than twenty quarters. The very name of purveyor became odious, and was changed into *chatour* or *achetour*.\* The purveyors did not pay cash for the goods taken by them, but gave wooden tallies, for which the farmers were to receive money at a future time. The peasants complained that their corn, cattle, and poultry were carried off, and that they received nothing but sticks instead. They could only describe their state of oppression by the use of whimsical metaphors; they declared that they were pinched, and peeled, and wrung, and picked clean, and plucked without scalding. The king's men—whether tax-gatherers or purveyors—went round the country in parties of eight or nine, turning the farmers out of doors, carrying away their stock, and outraging their wives and daughters.† We should observe, however, that these outrages are reported by the disaffected. Libels and political invectives are not to be credited entirely. The daily records of the nineteenth century are full of evils and grievances, but we know that a picture drawn from such materials would be an unfair presentment of the condition of England.

There were plunderers pretending to be purveyors or tax-gatherers: they were checked by an Act ordaining that all the king's takers, purveyors, and catours should carry the king's seal.‡ Under a weak sovereign, unlicensed collectors of

\* . . . ont pris les bledz a meyndre value qils ont valuz et auxint ont pris xxv quarters de bledz pur xx quarters pur ceo qils ont mesure chescun bushell a coumble. (4 Ed. III. c. 3; 5 Ed. III. c. 2; 36 Ed. III. c. 2.)

† I am so pyled with the Kyng,  
That I most fle fro my wonyng,  
And therefore woo is me.  
I had catell, now have I non;  
Thay take my bestis, and don thaim slon,  
And payen but a stick of tre.

("King Edward and the Shepherd," in Hartshorne's *Ancient Metrical Tales*): not printed for the first time; there are black-letter fragments of it at Lambeth. Compare with it Wright's "*Piers Plowman*," 68.

‡ 28 Ed. I. c. 2.

Zet cometh budeles with ful muche bost,  
Greythe me selver to the grene wax . . .

(*Political Songs*, 149.)

Jack Cade's followers complained of amercements called the "greene



course abounded, and regular takers became more than usually troublesome. Towards the end of the reign of Richard II.—

“A stop was put to all traffic, for merchants dared not travel for fear of being robbed. The farmers’ houses were pillaged of grain, and their beeves, pigs, and sheep carried away, without the owners daring to say a word. These enormities increased so much, that there was nothing but complaints heard. The common people said, ‘Times are sadly changed for the worse since the days of King Edward of happy memory. Justice was then rigorous in punishing the wicked. Then there was no man in England daring enough to take a fowl or sheep without paying for them, but now they carry off all things, and we must not speak. . . .’”\*

We should suppose that the husbandmen, in the civil wars which ensued, suffered as much, at least, as the general population; though we may doubt whether they were strong partisans of any dynasty. When Queen Margaret’s army ravaged the southern counties in 1461, sacking corn, cattle, and household stuff—even tearing meat from the spits—we do not believe that a farmer, whose home had been so stripped, began to swear by the White Rose; we should rather think that he growled out, “A plague on both your houses!” In like manner, the clubmen of the seventeenth century, who fortified themselves against Cromwell in the old Roman camp at Shaftesbury, did not pretend to be cavaliers; they professed to care only for their goods.

“If you offer to plunder or take our cattel,  
Be assured we will bid you battel”—

was the legend upon their banner.†

wax,” more in sums of money than can be found due of record in the King’s books. (2 Holinshed, 633.)

Officers, cryers of fee, and marshals of justices in Eyre . . . . there is a greater number of them than there ought to be, whereby the people are sore grieved. (3 Ed. I. c. 30.)

\* Froissart, chap. cvi.

† Sprigge’s “*Anglia Rediviva*,” 78, 79, 80.

How many wretched souls have we heard to say in the late troubles, What matter is it who gets the victory? We can pay but what they please to demand, and so much we pay now. (Hobbes’ Dialogue concerning the Common Law, quoted in Southey’s Common-Place Book.)

In the time of Louis XV., Rousseau found the peasants of Dauphiny living as barely as they could live, and trying to deceive the tax-gatherer by the appearance of extreme misery. It is difficult for remote settlers to act otherwise under a bad or a weak government, that does not secure property. Any display of wealth and comfort attracts the fiscal agent, or tempts the marauder, and a rich man must pretend to be as wretched as his neighbours. But there is small satisfaction in being rich if one must pretend to be poor; and the poverty which is simulated soon becomes real.\*

In a lawless age there can be no prosperous farmers. Handicraftsmen may associate, and may live in walled towns, but the farmer must dwell apart in the open country. The husbandmen of old times are never spoken of as a thriving class. Any trade was thought better than the farmer's. Chaucer carefully tells us that Osewold the Reeve was not a farmer:

“In youth he lerned had a good mistere,†  
He was a wel good wright, a carpentere.”

The Plowman in the Canterbury Tales—who must be taken for a farmer, not an agricultural labourer—was nearly the humblest member of the cavalcade.

Although an ancient farmer's rent must have been no light burden, its amount cannot well be estimated, since the old rentals rarely state the value of the services, and they were the better part of the rent. The insurgents under Wat Tyler obtained a concession, afterwards revoked, that no acre of bondland should be subject to a higher rent than fourpence.‡ In 1279, the value of the services due from the tenant of a yardland at Girton, near Cambridge, was eleven

\* M. Daresta de la Chavanne, *Histoire des Classes Agricoles en France*, 238.

† Mystery est le craft ou occupation per que home gaine son living.—(*Les Termes de la Ley*.)

The hangman in “*Measure for Measure*” calls his occupation a mystery.

‡ . . . Et quod nulla acra terræ in comitatibus prædictis quæ in Bondagio vel Servitio tenetur, altius quam ad Quatuor denarios haberetur. . . . (7 Rymer, 317.)

or twelve shillings. At the same time the annual services of a smaller tenement were often worth a shilling an acre.\* A farm of twenty acres at Redgrave returned in silver twenty-pence—no more than a penny an acre; but it also returned a quarter and two bushels of oats—seldom worth less than thirty-pence; the tenant's ploughing cost him fivepence, his arriage and carriage twenty-one pence, harvest work sixpence, general week-work six shillings and eightpence: altogether thirteen shillings and sixpence. There was a further charge of two hens and ten eggs for the homestead, and a payment for pannage of hogs and pasturage of sheep and kine.† We must remember, moreover, that the tenement was subject to a heriot and other manorial charges—to the king's fifteenth, the parson's tithe, and other dues of the Church. When all these items have been added together, we shall find that the land had burdens upon it as long ago as the thirteenth century.

The Vision and Creed of Piers Plowman often dwell on the sufferings of the peasantry. The farmers were distressed in spring and summer, after they had exhausted their stocks. They lived upon onions, parsley, cabbage, and oatcake, until August, when they might hope to have corn in the croft. Then they had a few months of abundance, idleness, and improvidence. In winter they were pinched again, often wearing the same pilch by night and by day. In summer the poor could not get food enough, and they suffered in winter through the want of clothing.‡ The author of the Creed encounters a plowman toiling through the mire, clothed in rags, with worn-out shoes and mittens; his wife, with bare and bleeding feet, driving the lean oxen, and wearing little more than a winnowing-cloth over her shoulders; their

\* Tenet ix acras terre custumabilis et faciet per annum vii<sup>xx</sup> opera. . . et valent consuetudines ejusdem per annum ix<sup>s</sup>. (2 Hundred Rolls, 555.)

† Add. 14850, f. 73 b.

‡ Wo in wynter tymes for wantynge of clothes,  
And in somer tyme selde soupen to the fulle.

(Vision, 284; also 273.)

children cradled at the end of the furrow, hungry, cold, and clamorous. We cannot make room for the entire picture. Here is a little sketch, probably drawn in the fifteenth century, of a gaunt, rawboned figure, begrimed with toil and sweat, and every grinder plainly shown through its thin, hollow cheeks:—

“ The Plowman plucked up his plowe,  
When midsummer moon was comen in,  
And said his beasts should eat enow,  
And lie in grasse up to the chin.  
Thei ben feeble both oxe and cowe,  
Nought of them left but bone and skinne ;  
He shook off share and coulter off drew,  
And hung his harness upon a pinne.

“ He took his tabard and staffe eke,  
And on his head he set his hat,  
And said he would Saint Thomas seek,  
On pilgrimage he goeth full flat ;  
In scrip he bare both bread and leeks,  
He was folswonke and all forswat :  
Men might have seen through both his cheeks,  
And every fang-tooth where it sat.”

*The Plowman's Prologue.\**

It is hard to understand so much misery, when we bear in mind that the poor people were not labourers, but farmers—expected to pay a considerable rent. It should be observed that the farms were reduced by under-settlement—that a man in the nominal occupation of thirty acres of land may have been, in truth, no more than a cottager. Perhaps, a bondman, who could not let his land without permission, lived more easily than an independent farmer.

Undersettlers, or subordinate tenants, are seldom expressly mentioned in the rentals. The three or four men who followed a customary tenant to the arable and autumnal preca-

\* We have modernised the stanzas a little. They are in some editions of Chaucer, but were evidently written after his time.

tions, must have been his undersettlers.\* These undersettlers usually returned to him a portion of the produce—the half or the third sheaf.† In addition to the lord's customary tenants he had, perhaps, some ordinary tenants on lease, who were in the position of our present tenantry. In the time of Edward I., the rent of a leasehold was commonly estimated at a fourth part of the very value of the land.‡

In almost every manor there were a few freehold tenants, rendering to the lord a quit rent, or slight agricultural services. They otherwise trained a falcon for the lord; returned a pair of spurs or of gloves, a pound of pepper or of cummin seed, a clove, a rose, a barbed arrow, or a needle.§ They were secured against arbitrary treatment by the writ called *Ne injuste vexes*; inferior tenants were not entitled to the protection of this writ.|| The undersettlers of freeholders are now and then noticed, as in the rolls of the half hundred of Ewelme, A.D. 1279.

There are very long lists of tenants in the rentals. When we consider that they do not usually comprehend undersettlers, and that to the several classes of tenants a crowd of landless men—the servants and retainers¶—ought to be added, we shall be inclined to conclude that the common estimates under-rate the ancient population—that England was pretty well peopled at the end of the thirteenth century.

\* Si aliquis eorum habeat undersetlam ad primam bedripam veniat.  
 . . . . . (Cust. Roff.) si famulas vel famula vel undersetles venerint.  
 (Add. 17450, f. 50.)

† The charge of a court baron. . . . . Ye good men that bene sworne,  
 ye shal enquire and truely present . . . . . if there be any bondman, that  
 letteth his land, that is to say, for the halfe, or for the thirde shefe without  
 leaue. . . . . (Tottyl's Law Tracts. The booke for a justice of peace,  
 etc. 83 b. 1574.) ‡ 6 Ed. I. c. 4. 13 Ed I. c. 21.

§ Galfr' le Faukoner tenet de eodem domino ix acras cum messuagio et  
 reddit per annum vi paria de jez cum vorterell' et unam lessam ad leporarios.  
 (2 Hundred Rolls, 416.) Ricard' Grucet tenet unam hidam terre et solvit  
 predicto Johanni per annum i denarium et dimidiam libram piperis et unam  
 clavam gariophili et unum radicem gingiberi et unam garlend rose. . (341.)  
 Will' le megre tenet . . . . . unam acram in utroque campo pro una  
 acu per annum. (858.) || 5 Fleta, 40. F. N. B. 31.

¶ Neque prætereunda est illa pars populi (quæ Angliæ fere est peculiaris,  
 nec alibi, quod scio, in usu, nisi forte apud Polonos) famuli scilicet nobilium.  
 —(Bacon De Aug. Scient. viii. 3.)

ART. III.—ACCORD AND SATISFACTION.

**I**T is proposed to consider, in a very brief way, the objection which is raised to the introduction of the doctrine of Novation into the Common Law. If that objection rests upon any well-settled principle, it should by all means be sustained; but if, on the other hand, it has no rational foundation, it should not be permitted to obstruct the operation of so useful a doctrine.

Novation is a term of the Civil Law, and it was employed to denote the substitution of one contract in the place of another. A transaction of this kind was equally valid whether the original contract had been already executed as to one of the parties, or whether it still remained executory as to both. It is only in the latter event that the new is substituted for the old contract at the Common Law. The maxim of the Common Law is, that an accord without satisfaction is no bar to a suit upon the original obligation; and it is accordingly laid down, that an agreement to accept anything other than the original debt is not binding unless founded upon some new consideration. This, it will be observed, is not simply an application of the well-known principle of law which requires that each contract shall have *a* consideration, but it is an additional requirement that the consideration on both sides shall be *equal*.

If a substituted stood upon the same footing with an original contract, the debtor's promise to give something else would be a consideration for the relinquishment of the old debt, and its relinquishment would in turn be a consideration for the debtor's promise. And why may not a creditor relinquish a debt in consideration of the debtor's promise? Is it because a sum of money due is thought to be of greater value than the same amount of money in hand? Such seems to be the drift of the reasoning against such relinquishment; for it is advanced as an argument, that a creditor having performed his part of

the contract has a "perfect right" to the debt. ("Byles on Bills," Am. edition, 182, note by the distinguished American editor.) This is true; but it makes in favour of, instead of against, the validity of the new contract; it is a reason why the creditor *can* give the money due, but by no means why he *cannot*. One has a "perfect right" to money in his possession, but that was never heard of as an objection to his using it. A lawful way to use money is to give it in consideration for a contemporaneous promise. The relinquishment of a debt to which the creditor has a "perfect right," is equivalent to an advance of an equal amount of money. Why does not the law treat it, then, as a consideration for a present promise? It is said, in answer, that the creditor cannot be bound by a naked agreement to release a debt. But it is a mistake to consider the agreement naked, and here lies the fallacy of the argument. It has a consideration; to wit, the promise of the debtor to give something else. Such a promise is deemed sufficient to sustain an agreement to pay money *outright*; and, if so, it must, of necessity, be sufficient to sustain a promise to release a debt; for however "perfect" may be the "right" to the debt, possession is still necessary to make the ownership complete.

Thus it appears that substituted and original contracts stand in reason upon the same footing. How then is the distinction which the law makes between them to be accounted for? It probably arose from the following considerations.

Should the Courts examine into the consideration of contracts, they would be constrained by the principles of equity which guide their action, to require that the consideration on one side should be equal to that on the other. In order to enforce such a rule, it would be necessary to put a specific valuation upon each article that could become the subject-matter of a contract. But as the value of goods fluctuates according to the state of the market, this could not be done. The Courts, therefore, would be obliged either to pronounce all contracts void for want of equality of consideration, or to



assume to be the agent of both parties to re-adjust the terms of the contracts. It is to avoid either alternative that they refuse to inquire into the *sufficiency* of the consideration.

There is one exception to the refusal to inquire into the adequacy of the consideration; to wit, in contracts for the exchange of money. Here the value of the articles to be exchanged is fixed by law, and the Courts cannot refuse, but are bound to take judicial notice of the fact. They accordingly hold that, as money is the legal standard of value, contracts to exchange different amounts of money are not binding, because there is no consideration for the balance of, or difference between, the two amounts.

An agreement to give a different amount of money from that due, or even the same amount upon a different time (time being an additional legal consideration without a return) is not binding, because it lacks the equality of consideration which the law requires in exchanges of money; and without a legal sanction to give the agreement efficacy, it amounts to nothing; hence it cannot be a substitute for, or satisfaction of, the debt. As agreements of this kind make up the bulk of substituted contracts, which are, for the most part, agreements either for a reduction in the amount of the debt, or for an extension of credit, it was inferred, though erroneously, that *all* substituted contracts are likewise not binding. It was not observed that where something other than money is offered in consideration for the money which is due, the transaction stands upon the same footing with other bargains; in such case, as in ordinary barter, the debtor agrees to give one thing in return for another. “And where,” said Baron Parke, in *Cooper v. Parker* (15 C. B., 822), “the matter pleaded in satisfaction of a liquidated demand is of uncertain value, the Court will not set a value upon it, or inquire into the sufficiency of the consideration.” In consequence of this oversight in not discriminating between the two classes of contract,—that is, between contracts for the exchange of money, and contracts not for the exchange of money,—the ambiguous maxim, that an

accord without satisfaction is no bar, was devised in order to prohibit all substituted contracts. That maxim *says*, that an agreement is not satisfaction of a debt; it *means*, that a void agreement, which is not an agreement, is not satisfaction of a debt. The question always is, whether the agreement is binding; that is, whether it amounts to a legal agreement. It is only when it wants some essential of a valid agreement, like *e. g.* a consideration, that it is said not to be satisfaction of a debt. Where there is no doubt about the consideration, as in case of a fresh consideration, the agreement is invariably held to be satisfaction, if such was the intention of the parties.

It is easy to see how the maxim, that an accord without satisfaction is no bar, originated. It is an undue extension of the familiar rule, that an agreement to do what the party is already bound to do is not binding. Thus, in trespass for taking the plaintiff's cattle, it was held not to be a good plea to say, that there was an accord that the plaintiff should have his cattle again; that not being satisfaction, unless accompanied by delivery of the cattle. (1 *Bac. Abr.* 22.) Accordingly, where the new agreement is merely to do what the party is already bound to do, it is strictly true that the additional agreement is not satisfaction unless executed. The new agreement is not binding because it wants a consideration, and, therefore, having no legal existence, it could not be satisfaction of the demand.

It is contended that the law must protect the creditor's rights, which would be impaired if the debtor could escape from the terms of one contract by making another. But the answer to this is, that the new contract, like any ordinary contract, requires the consent of both parties; and if the creditor cannot take care of his interest in making it, the reason must be that he is incapable of making any bargain. The argument proves too much; it would prevent all contracts. Instead of an injury, however, the new contract works a benefit to the creditor, as well as to the debtor. Take, for the sake of illustration, the following case:—A contractor, who is unable

to raise money, is indebted to a person who is about to have a house built. Why should not the creditor be allowed to relinquish his debt, in consideration of his debtor's agreeing to build him a house of which he stands in need? In this way the debtor would be enabled to pay his debt, which otherwise he could not do, and a creditor to save himself the expenditure of an equal amount of money. Thus it is often the only, as well as the best mode in which a creditor is able to collect his debts.

It is evident that the maxim is not now looked upon by the Courts with favour. Thus Baron Parke, following Mr. Justice Byles in his *Treatise on Bills*, p. 153, decided in *Foster v. Dawber* (6 Exch., 839), that the rule does not apply to commercial paper; which he held to be governed by the law merchant, and to follow, in this respect, the civil law and the continental law of Europe. By this decision, contracts for the exchange of money, which mainly take the form of promissory notes and bills of exchange, and to which alone, as has been shown, the reason of this rule applies, are withdrawn from its application. This decision looks like the precursor of the total overthrow of the maxim; for it is inconceivable that the same Court will continue, for any length of time, to hold an agreement to accept a part of a sum of money in discharge of the whole to be satisfaction, if put in the form of a promissory note or bill of exchange, but not if put in any other form of a contract, even though it be followed by actual payment or execution.

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ART. IV.—MAY'S CONSTITUTIONAL HISTORY  
OF ENGLAND.

*The Constitutional History of England since the Accession of George the Third, 1760—1860. By Thomas Erskine May, C.B. In Two Volumes. Vol. II. London, 1863.*

ALTHOUGH protests of the strongest nature have been entered against the introduction of the principle of the division of labour into history, the practice, we fear, has become so inveterate, and the advantages which attend it, under existing circumstances, are so unquestionable, that it seems best to submit to it with as good a grace as possible. Indeed, considering the fulness of research and minuteness of inquiry which the character of the present age renders necessary in all historical compositions of a more ambitious order, we see no likelihood of any work which shall be the History of England being produced in our day, or even in that of our immediate descendants. Not only with respect to those periods of history of which most has been written does much remain in obscurity—many incidents and circumstances being inadequately known, and the relations of many events to each other imperfectly understood—but much, also, remains to be done with respect to those earlier periods which used scarcely to be considered as coming within the domain of history, while antiquarian research and the science of languages have shed light, obscure but startling, even on confessedly pre-historic times. Bearing, as this latter inquiry does, on the origin and migration of races, it is impossible to dismiss it as irrelevant, when we have to deal with the history of a composite people such as that which inhabits these islands; and, at all events, until it has been pursued further than it has hitherto been, it will be impossible to pronounce how much or how little it may affect what is known as the History of England. But even

without stretching the province of history beyond its received boundaries, it is quite clear that the different divisions and branches of our history must be pursued separately for a long time to come, and that it will only be after much labour has been undergone in each department, and with reference to each period, that the materials of a work such as all must desire will be fully prepared. Then only, if even then, will it be possible for some transcendent genius to bind the various sections in one *fasciculus*, and to present to the world a History of England which shall indeed be "a possession for ever."

Meanwhile, whatever industry may be bestowed on special subjects connected with our history, there are approximations to such a result. No one now thinks of writing the political history of any period without reference to its religious, intellectual, and social condition. The ecclesiastical historian no longer ventures to shut his eyes to those mundane influences, which modify so powerfully, though often unconsciously, all the opinions and all the practices of men. The days have gone by when it was possible for an author to write the life of Bacon the Lord Chancellor, while ignoring Bacon the philosopher.

Constitutional history, especially that of England, throws its branches out widely, and covers a large portion of the field of general history. It connects itself with the revolutions of race, of thought, and of manners, as well as with those of government. Each step in the progress of our constitution is marked by great changes in society, both precedent and subsequent, nearer or more remote. The battle-field, the council board, the debates of parliament, the judgments of courts of law, the pulpit, the press, the coffee-house, and the club, afford materials for the records of the constitutional historian of England. A mere statement of the law, as it was gradually developed, however accurate and comprehensive, would most inadequately represent the real history of our constitution. It is but a small portion of the constitution of this country which is to be gathered from Acts of Parliament and the Reports—

from our statute and common law. Its predominating principles are to be found in those sentiments which are engraved deep on the hearts of Englishmen, and which the events of a long and eventful history have contributed to form.

It is obvious, from these considerations, that no department of English history possesses a higher importance or deeper interest than that which is termed constitutional history. No names call forth a prouder feeling in the breasts of Englishmen than those which belong to it; no events have so powerfully affected all our habits and feelings as those which it records. Hallam's great work, it must be admitted, has never been popular, but this arises not from the subject, but from his mode of treating it. No man was better fitted, in many respects, to undertake such a subject. His comprehensive and inquiring mind, his clear perception of the real point of every question, and his admirable skill in weighing opposing views, and striking a balance between conflicting parties, were rare qualifications for such a task. But these qualities in him, from not being properly tempered by others no less important, were apt to assume the appearance of rigidity and severity. He would not admit into history the principle of set-off, without which, we humbly think, justice can never be done either to individuals or to parties. His iconoclasm was too unsparing—not merely viewed with reference to popular feeling, but on a fair philosophical estimate.

We have no intention of comparing Mr. May as a constitutional historian with Hallam; but in some respects, unquestionably, he has the advantage of the latter, and we shall certainly be surprised if his work does not enjoy a larger amount of popularity than that of which it is the supplement. While perfectly fair and impartial in his statements and estimates, and while arriving at his conclusion with sufficient deliberation, he yet pronounces with firm decision in favour of liberty and progress, and of those by whom they were supported during the period which his work embraces. His views are not extreme, but they are unmistakable; they are

unwavering, and, we venture to think, they are unassailable. They are the views which commend themselves to every man who studies the history of this country, from the commencement of the reign of George III. to the present time, without prejudice or partiality. They are the views which our present experience shows to be sound and wise; and they are the views which we are persuaded will be ratified by the judgment of posterity.

In a recent number of this Journal,\* we introduced to the notice of our readers the first volume of Mr. May's work, and we then expressed our high opinion of the manner in which he had accomplished that portion of his task. In the volume to which we refer he had treated of the influence and revenues of the Crown, the House of Lords, the House of Commons, and the relations of parliament to the crown, the law, and the people. In the present volume, which completes the work, he discusses party, the press and liberty of opinion, the liberty of the subject, the church and religious liberty, local government, Ireland before the Union, British colonies and dependencies, and the progress of general legislation. It is obvious enough, from the above enumeration, that the author has omitted nothing which could fairly be considered as directly connected with the subject of which he treats, while under each head will be found the utmost fulness of detail, without the slightest tendency to prolixity. No undue prominence is given to subjects which are of inferior interest, and no question of essential importance has been lightly passed over. The work is obviously the production not merely of a well informed and painstaking author, but of a man of sound and practical judgment; of one who has not only a thorough knowledge of the history of the period which he discusses, but an intimate acquaintance with the present state of public opinion, and with the relations of existing statesmen and parties. If Gibbon owed part of his success, as the historian of the Decline

\* November, 1861.

and Fall of the Roman Empire, to the observations which he had made as a member of the House of Commons, we cannot doubt that Mr. May's official position has been of incalculable advantage to him, in treating a subject which, in all its branches, is more or less directly connected with the House of which he is so important and so efficient an officer.

The subjects which occupy the present volume possess, in some respects, even a higher interest than those to which the former was devoted, because they touch more directly the happiness and prosperity of the community at large, and the practical working of the constitutional system under which we live. The limits of the prerogative, the law relating to impeachment, and the right of stopping the supplies, are fortunately at the present day subjects of little more than theoretical interest; but the freedom of the press, religious liberty, and the progress of general legislature, are matters with which we have all more or less to do, and of which the present state cannot be separated from the past history. Even with respect to party, modified and subdued as that great institution now is, it cannot be said that it belongs to a former state of things, and has been finally disposed of. Much as party has been abused by unscrupulous men, and much as its evils have been deplored by wise and good men, its existence forms one of the necessary conditions of sound constitutional government. In its general results on the progress of the constitution there is no serious ground for complaint, unless on the supposition, that without party men would all have been enlightened, patriotic, and disinterested. But taking men as they are, the best prospect of sound government arises, when no principle can be pushed to an extreme; when the views on one side are counteracted by those on the other; when the party in power is confronted in all its movements by the party seeking for power; when her Majesty's Ministers must answer for their policy and conduct, before parliament and the country, to her Majesty's Opposition.

“The annals of party,” says Mr. May, with much truth,



“embrace a large portion of the history of England,” and he refers in a note to Mr. Wingrove Cooke’s “History of Party,” to which he acknowledges many obligations, as relating “the most instructive incidents of general history.” Of course he considers the subject under a more limited aspect than is done in the able and interesting work of Mr. Cooke, and confines himself chiefly to the influence of party “in advancing or retarding the progress of constitutional liberty and enlightened legislature.” His general view on the subject may be gathered from the following statement of the principles represented by English parties :

“The parties in which Englishmen have associated have represented cardinal principles of government—authority on the one side, popular rights and privileges on the other. The former principle, pressed to extremes, would tend to absolutism—the latter, to a republic ; but, controlled within proper limits, they are both necessary for the safe working of a balanced constitution. When parties have lost sight of these principles, in pursuit of objects less worthy, they have degenerated into factions.”—Vol. II. p. 2.

Several circumstances led to the revival of the Tory party on the accession of George III.; and their alliance with the king’s friends at once placed them in a position of advantage over the Whigs—a position from which they were never permanently dislodged for the long period of seventy years. In addition to that respect for authority which had always characterised the party, they now adopted a principle not hitherto recognised by any set of Englishmen—a determined and indiscriminating opposition to change of any kind in our laws. A few amendments had been wrung from them by the opposition, backed by the rising influence of public opinion ; but, in the main, the laws of England, as expounded by Blackstone, were the laws of England as they existed towards the latter years of the reign of George IV. But the new commercial policy inaugurated by Huskisson, the partial mitigation of the penal code, the repeal of the Test and Corporation Acts, and the passing of the Catholic Relief Act, had, before the accession of William

IV., shown that the old Tory creed could no longer be kept whole. After Parliamentary Reform had been carried, the Tories wisely discarded their ancient dogma, and professed themselves willing to amend the institutions of the country. Much of this altered state of feeling was due to the great change in public opinion, which had been gradually brought about by increasing intelligence—much to the impossibility of maintaining, under altered circumstances, their old position; but much also was due to the wise and liberal views of the late Sir Robert Peel. Great as a minister, he was, we think, still greater as a leader of opposition. While the Whigs during the first two years after the Reform Act were forwarding, what Mr. May justly calls “the noblest legislative measures which have ever done honour to the British Parliament,” abolishing slavery, throwing open the commerce of the East, reforming the church in Ireland, averting the social peril of the Poor Laws, Sir Robert Peel maintained the cause of the opposition with the dignity of an English statesman. He frankly stated that he “considered the Reform Bill a final and irrevocable settlement of a great constitutional question—a settlement which no friend to the peace and welfare of this country would attempt to disturb, either by direct or indirect means.” Avowing this principle, and professing to desire the improvement, but not the destruction, of our institutions, he gradually acquired an extensive influence throughout the country. A large proportion of the intelligence and respectability of the nation had been in favour of the Reform Bill, and of the ministry by which that measure was introduced and carried. Even many who had wished a less extensive change, but who saw that some change was necessary, had not been unfriendly to that great political experiment. The Whig party seemed to have gained a supremacy from which they would not be cast down, until a cycle of many years had brought round a revolution in public opinion and in all the relations of the State. The proposal to apply the surplus revenues of the Irish church to secular purposes, the breaking-up of the Grey

cabinet, the weakness of the Melbourne ministry, and their supposed compact with the O'Connell party, joined to the great ability and prudence displayed by Sir Robert Peel, supported as he was by Mr. Stanley and Sir James Graham, loosened the hold of the Whigs on the country. Although several measures of importance were carried, the Melbourne ministry gradually lost influence ; and, at last, the accession of Sir Robert Peel to power, introduced a new series of reforms which have been continued by the legislature down to the present time, and which have operated most beneficially on the material interests of the community.

How far Sir Robert Peel was justified, as a party leader, in proposing the Repeal of the Corn Laws is a question entirely apart from the merits of the measure itself. Mr. May is of opinion that he was guilty of political disloyalty, and that his conduct was opposed to all the principles of party ethics :

“ As a statesman,” he says, “ Sir Robert Peel was entitled to the gratitude of his country. No other man could then have passed this vital measure, for which he sacrificed the confidence of followers and the attachment of friends ; but, as the leader of a party, he was unfaithful and disloyal. The events of 1829 were repeated in 1846. The parallel between ‘ Protestantism’ and ‘ Protection’ was complete. A second time he yielded to political necessity and a sense of paramount duty to the State, and found himself committed to a measure which he had gained the confidence of his party by opposing. Again was he constrained to rely upon political opponents to support him against his own friends. He passed this last measure of his political life amid the reproaches and execrations of his party. He had assigned the credit of the Catholic Relief Act to Mr. Canning, whom he had constantly opposed ; and he acknowledged that the credit of this measure was due to ‘ the unadorned eloquence of Richard Cobden,’ the apostle of Free-trade, whom he had hitherto scouted. As he had braved the hostility of his friends for the public good, the people applauded his courage and self-sacrifice, felt for him as he writhed under the scourging of his merciless foes and pitied him when he fell buried under the ruins of the great political fabric which his own genius had reconstructed, and his own

hands had twice destroyed. But every one was aware that so long as party ties and obligations should continue to form an essential part of parliamentary government, the first statesman of the age had forfeited all future claim to govern.”—Vol. II. pp. 72, 73.

The portion of the present volume devoted to the Press and Liberty of Opinion may be summed up in the words with which the author opens the subject:—

“We now approach the greatest of all our liberties—liberty of opinion. We have to investigate the development of political discussion ; to follow its contests with power ; to observe it repressed and discouraged, but gradually prevailing over laws and rulers, until the enlightened judgment of a free people has become the law by which the State is governed.”—Vol. II. p. 95.

The greatest gain to constitutional liberty which was obtained during the reign of George III., was unquestionably the establishment of the freedom of the press. How far the doctrine laid down by Lord Mansfield, viz., that it was the province of the court only to judge of the criminality of a libel, was sound in point of law, we shall not now take upon us to determine. But questionable as it might be on principle, it had certainly some authority in its favour, and was enforced, as Mr. May says, “with startling clearness by his lordship.” To no man does the liberty of the press owe more than to Erskine, who boldly combated this view in his admirable argument in the Dean of St. Asaph’s case, by which, as well as by his speech on the trial, public opinion was powerfully influenced. So strong was the impression produced, that on the first introduction in the House of Commons of Mr. Fox’s Libel Bill, which was in the form of a declaratory law, there was not a dissentient voice, although when it finally passed the Upper House, Lord Thurlow and five other lords signed a protest, predicting “the confusion and destruction of the law of England.” It was certainly destined to be “the confusion and destruction” of arbitrary prosecutions for libel—not, indeed, at once, for these continued for many years afterwards;

but ultimately, as intelligent and liberal views spread through the community, it produced this result with signal effect, so that any government which should now attempt to restrain the liberty of the press by such means, would at once forfeit the confidence of the nation.

One unquestionable result of the liberty of the press has been to elevate the press itself. Higher intellects have been attracted to its service; and presenting, as it has long done, to the public rapid and full information on all events, both at home and abroad, and able comments on all the topics of the day, mere virulent invectives on public men are now considered as simply absurd, and produce, if by any accident they occasionally appear, no dangerous effects whatever. Even those slanderous attacks on private individuals which were once the disgrace of the press, are now almost unknown. Private persons are seldom brought before the public by the press, unless they intrude themselves on the world by their own actions, speeches, or writings; and the great question is always whether the comments are fair and honest as they purport to be. Addressing intelligent readers, and supplying important materials for thought and reflection, the conductors of the press would now feel it to be mere impertinence, unless under some imperative obligation of public duty, to drag individuals from the privacy of domestic life and hold them up to general censure or ridicule. Journalism has now become a profession, to secure success in which the possession of a copious vocabulary of scurrilous language, and of a large amount of bitter feeling, is of little avail.\*

Mr. May has treated the subject of the press in connexion

\* The estimation in which the press was held in the early part of the present century in certain quarters may be gathered from the following circumstance, mentioned by Lord Colchester (Diary II. 240), and quoted by Mr. May:—"In 1808, the benchers of Lincoln's Inn passed a by-law, excluding all persons who had written for hire, in the daily papers, from being called to the bar. The other Inns of Court refused to accede to such a proposition. On the 23rd March, 1809, Mr. Sheridan presented a petition complaining of this by-law, which was generally condemned in debate, and it was soon afterwards rescinded by the Benchers."

with the liberty of opinion. Public meetings, political associations, and "agitation," early in the reign of George III., began to exercise an influence over government and the legislature more powerful than even that of the press. It was in connexion with Wilkes's election for Middlesex, in 1768, that public meetings first took their place among the institutions of the country. In no less than seventeen counties the freeholders met in support of the electors of Middlesex, whose rights had been violated by the Commons. But the meetings which were held ten years later for the purpose of discussing economical and parliamentary reform were still more formidable. The freeholders of Yorkshire and twenty-three other counties, and the inhabitants of many cities were assembled by the sheriffs and chief magistrates; and at these gatherings all the leading men of each neighbourhood were present. A great meeting was held in Westminster Hall, at which Mr. Fox presided, and was attended by many of the most distinguished members of the opposition. These assemblages were the results of concerted movements throughout the country; and committees of correspondence were appointed by the several counties, who kept alive the agitation. Other political clubs and societies were established, which kept before the public the different causes for the promotion of which they were formed, by meetings, deputations, resolutions, petitions, and publications. Such was the beginning of a system which was destined to produce the most powerful influence in advancing political reform and good government. Still more powerful is the influence they have had in forming the political habits of Englishmen, by making public discussion the great instrument of propagating opinions, and exciting the attention of the legislature.

In the chapter on the Liberty of the Subject, a very clear and succinct account is given of the proceedings against Wilkes, and the printers of No. 45 of the *North Briton*, which involved the great question of the legality of general warrants. When the bill of exceptions, which was tendered in Leach's

case, came on to be argued in the Court of Queen's Bench, precedents were cited showing the practice of the Secretary of State's office ever since the Revolution; but Lord Mansfield pronounced the warrant illegal, saying, "It is not fit that the judging of the information should be left to the discretion of the officer. The magistrate should judge, and give certain directions to the officer." The other three judges concurred, believing that "no degree of antiquity can give sanction to a usage bad in itself." (3 Burr. 1742.) In the action brought by Entick, a writer in the *Monitor, or British Freeholder*, for seizing his books and papers under a general search warrant, the same question arose. The warrant specified the name of the person against whom it was directed, but gave a general authority to the messengers to take all his books and papers, without specifying what particular papers were to be seized. On a special verdict, the Court of Common Pleas held the warrant to be illegal, although it was found by the special verdict that many such warrants had been issued since the Revolution. Lord Camden considered that the practice had arisen in the Star Chamber, and that, having been revived and authorised by the Licensing Act of Charles II., in the person of the Secretary of State, it had been continued after the expiration of that Act. (*Entick v. Carrington*, 19 St. Tr. 1030.) Lord Mansfield and the Court of King's Bench shared in this conjecture. (*Leach v. Money*, 3 Burr. 1692, 1767.) Lord Camden, it may be mentioned, doubted the right of the Secretary of State to commit at all, except for high treason; but the Court, from deference to prior decisions, felt bound to acknowledge the right.

From the Revolution to the rebellion of 1745, the Habeas Corpus Act had been frequently suspended. But although, during the American war, the king had been empowered to secure persons suspected of high treason committed in North America, or on the high seas, or of the crime of piracy, no attempt had been made to suspend the civil liberties of Englishmen at home, for nearly fifty years after the invasion



of the realm by Charles Edward. In 1794, however, Mr. Pitt moved for a bill to empower his Majesty to secure and detain persons suspected of conspiring against his person and government, justifying the measure on the ground, that whatever the temporary danger of placing such power in the hands of the government, it was far less than the danger with which the constitution and society were threatened. Fox, Grey, and Sheridan, strongly opposed the bill, and denied that any such dangers threatened the State as would justify the surrender of the chief safeguard of personal freedom. The measure, however, passed, and was continued till the end of 1801.

“Though termed,” says Mr. May, “a suspension of the Habeas Corpus Act, it was, in truth, a suspension of Magna Charta, and of the cardinal principles of the common law. Every man had hitherto been free from imprisonment until charged with crime by information upon oath, and entitled to a speedy trial, and the judgment of his peers. But any subject could now be arrested on suspicion of guilt; his accusers were unknown, and in vain might he demand public accusation and trial. Spies and treacherous accomplices, however circumstantial in their narratives to Secretaries of State, shrank from the witness-box, and their victims rotted in gaol. Whatever the judgment, temper, and good faith of the executive, such a power was arbitrary, and could scarcely fail to be abused. Whatever the danger by which it was justified, never did the subject so much need the protection of the laws, as when government and society were filled with suspicion and alarm.”—Vol. II. pp. 265-6.

Great discussion took place before the Act had expired, on the bill to indemnify all persons who, since the 1st February, 1793, had acted in the apprehension of persons suspected of high treason. The bill was strongly opposed, but was justified on the ground that it would be impossible for persons accused of abuses to defend themselves, without disclosing secrets dangerous to the lives of individuals and to the State. There is, no doubt, much force in this justification of the bill of indemnity, though we cannot but agree with Mr. May, that



“it were better to withhold such powers, than to scrutinize their exercise too curiously ;” and that, “were any argument needed against the suspension of the law, it would be found in the reasons urged for indemnity.” After the suspension of the Habeas Corpus Act, in 1817, a similar bill of indemnity was brought forward by ministers, and passed after strenuous opposition. The discussions, however, which arose, disclosed the great evils arising from suspending fundamental laws ; and since then the Habeas Corpus Act has not been interfered with in England.

In the chapters on the Church and Religious Liberty we have a full account of all those memorable struggles so long maintained by the church against the claims of Dissenters and Roman Catholics to political equality. The granting of these claims and the reform of abuses within the church herself, have removed the grounds of much jealousy and ill-will ; her position as a National Church has been by no means compromised by such concessions ; and if her clergy are only willing, as to a great extent they are, to keep pace with the advancing enlightenment of the age, she has the opportunity of enjoying a much wider popularity, and doing a much larger amount of good than at any former period of her history. But one essential condition of her permanence and success as a National Church at the present day is, that she should retain and still further increase her power of comprehending men of various opinions and modes of thought.

“The fold of the church,” says Mr. May, “has been found wide enough to embrace many diversities of doctrine and ceremony. The convictions, doubts, and predilections of the 16th century still prevail, with many of later growth ; but enlightened Churchmen, without absolute identity of opinion, have been proud to acknowledge the same religious communion—just as citizens, divided into political parties, are yet loyal and patriotic members of the State. And if the founders of the reformed church erred in prescribing too straight a uniformity, the wisest of her rulers, in an age of active thought and free discussion, have generally shown a liberal and

cautious spirit in dealing with theological controversies. The ecclesiastical courts have also given breadth to her Articles and Liturgy. Never was comprehension more politic. The time has come when any serious schism might bring ruin on the church."—Vol. II. p. 445.

The remaining part of the volume is devoted to a variety of subjects of much interest. In that which treats of the progress of general legislation, and which concludes the work, will be found a reference to the various measures of legal and financial reform, and others bearing on the social welfare of the community, which have been adopted in recent times. The observations of the author are very just and valuable, but the extent and variety of the subjects prevent him doing more than merely touching upon them. With respect to one important topic alluded to, viz., the improved spirit and temper of the judges, Mr. May has truly stated that the measure, passed at the suggestion of George III., which provided that the commissions of the judges should not expire with the demise of the crown, although entitled to approval and respect, did not prevent them being leagued closely with the crown.

"But no sooner had principles of freedom and responsible government gained ascendancy, than judges were animated by independence and liberality. Henceforward they administered justice in the spirit of Lord Camden, and promoted the amendment of the laws with the enlightenment of statesmen."—Vol. II. p. 595.

We have already stated the high estimate we have formed of Mr. May's work, and we desire again to express, before concluding, our sense of the full and accurate information which it conveys, of the sound and judicious views which are put forward, and of the admirable spirit in which the whole is conceived and executed. In our notice of the former volume, we stated our approval of the plan adopted by the author of deviating from the chronological narrative, and treating the subject under certain leading heads. We still adhere to the

view then expressed ; but, in reading the second volume, we confess we have occasionally experienced doubts as to whether this method has not somewhat impaired the interest of the book on continuous perusal, and we have heard similar feelings expressed by others. But be that as it may, there can be no doubt that the plan adopted is by far the most convenient for purposes of reference. Thus, the whole information connected with the revenues of the crown, the civil list, and pensions, is to be found under one chapter, and the different cases of suspension of the Habeas Corpus Act are brought together in the chapter on the Liberty of the Subject. We give these only as instances, for the same advantage arises from the mode in which all the various topics which fall within the purview of the work are treated. Not only is much inconvenience avoided by this method, but each particular subject is more fully presented and more thoroughly discussed than would be possible, without much prolixity and repetition, in a chronological narrative.

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#### ART. V.—ADMINISTRATION TO FOREIGNERS DYING IN ENGLAND.

A VALUABLE suggestion has recently been made by the Judge of the Court of Probate, upon the subject of the *hæreditates jacentes* of foreigners dying in England without relatives near them, in cases where the 24 & 25 Vict. c. 121, § 4, does not apply.

In a country like ours, to which the stranger resorts not for pleasure but for profit, not to spend but to make money, it must frequently happen that when he dies here he dies with more or less of property in his actual possession.

At most times, also, this foreigner dies indebted to some persons in England, and at all times he requires burial. As

for his property, it often happens that, such as it is, it is in a form which makes it liable either to depredation or waste. It may consist of commercial securities, which exact early realization, or it may be cash and personal effects, which lie at the mercy of a dishonest landlord.

Under such circumstances as these the following consequences will constantly occur : the estate is lost, wasted, or stolen, and the British creditor and foreign heir are alike defrauded. But these consequences are as contrary to that comity which a nation should show nations, its friends, as they are opposed to that care of its own subjects which is the aim of all political government.

We have intimated that our system of law has not provided a remedy for this state of evil ; and it is so, though at the same time it is true that occasionally and spasmodically something has been done or attempted in practice to arrest these mischiefs.

The case of *Gudolle, deceased*, decided long since by Sir John Nicholl, and reported in Mr. Coote's Common Form Practice of the Court of Probate, will give us the best idea of what the old Prerogative Court thought itself able to do in these cases. There a foreigner had died in this country, away from his relatives, possessed of certain bills of exchange upon English merchants. Sir John Nicholl, under the pressure of the circumstances, granted administration to an English friend or acquaintance of the deceased, who had procured the bills to be accepted, and had paid certain necessary expenses of the deceased, " limited to the sums due and to become due upon the bills of exchange, and after the administrator should have reimbursed himself the money which he had expended on behalf of the deceased, and also the expenses of the application to the Court, to invest the balance in his own name in Government securities, and to keep it invested until a general representation should be effected to the deceased."

There are great and obvious defects in such a grant of administration as this. In the first place, there is the primary

defect of granting administration to a mere private person, without choice or discrimination, because he has the earliest information, and is the first to apply for it. In the second place, the mistake is committed of giving to the applicant's debt or claim, whatever it be, a preference that the law does not necessarily accord to it.

It is impossible for the Court, under such circumstances, to know whether it grants to an honest man or a trickster. It takes the applicant at his own word, and upon his own showing, and it has no alternative between acquiescence and refusal. If it comply with his prayer, it may make the very serious mistake of sacrificing the interests of foreign heirs beyond all hope of remedy. If it withhold its consent, and refuse to grant administration, it may totally sacrifice the interests of both the heir and the honest creditor, by exposing *bona peritura* to certain loss.

This is the dilemma which the judicial mind of the present Judge of the Probate Court has lately noted; and for this double and inevitable evil he has proposed a remedy as easy as it is sufficient. The suggestion was made by him in the course of last Michaelmas term, in the case of one *Wyckoff*, deceased.

In this case an American belonging to one of the Confederate States had died on board an English vessel, during his passage to this country. He had in his possession certain bills of exchange, payable to his order here. He had no relatives in this country, and all communication between his family and England was stopped by Mr. Lincoln's blockade.

In hearing an application from a person whose interest was much the same as that of the grantee in *Gudolle's* case, Sir Cresswell Cresswell had, on the first occasion, thrown out a suggestion that the Queen's proctor should take administration to this foreigner. This offer had been declined, though it does not appear why, and Sir Cresswell Cresswell afterwards, in giving judgment, expressed his embarrassment at the refusal, and observed, by way of comment upon it, "In all

cases of this sort it is better that there should be some public officer. We might have a scramble between different individuals ; some might get one part of the property and others another part of it, and they might all say, ‘ Make me the administrator,’ whereas here is the Queen’s proctor a responsible party.”

This, like other suggestions of Sir Cresswell Cresswell, displays the acumen and judgment which are the characteristics of that eminent judge, and we regret that the coyness of the Crown officer should have thrown impediments in the way of establishing a new and legitimate practice ; but we trust that when another case of the like nature shall occur, the modesty of the Crown officer will have disappeared, and that he will yield to the recommendation of the judge, and consent to do a public service, even though it be accompanied by private emolument.

In regard to the suggested practice, there is, as we have intimated, very much to be said *à priori* in its favour, but this mode of demonstration is wholly unnecessary, for it has already had, during a long flux of time, the confirmatory support of experience upon a large scale in another part of the British dominions. In the Presidencies of India a similar practice has been established for the period of a century. In each Presidency there is found an Administrator-General, whose duties are to collect and secure the *hæreditates jacentes* of Englishmen and others who die in India.

The old law upon this subject underwent a revision a few years ago, and the existing regulations are to be found in the Act No. 8, of 1855. As this statute is little known in this country, we will extract such of its provisions as are generally applicable to the matters we have been discussing.

By the first section of this Act, an Administrator-General is appointed to each of the three Presidencies.

By the seventh section, every such Administrator is required to give security for the due execution of his office in the amount of two lakhs of Rupees.

By the eighth section, he is released from having to enter into administration bonds.

The ninth section enacts, that any letters of administration or letters *ad colligenda bona*, which shall be granted by the Supreme Court of Judicature at any of the Presidencies, shall be granted to the Administrator-General, unless they shall be granted to the next of kin of the deceased, and declares that the Administrator-General of the Presidencies shall be deemed to have a right to letters of administration in preference to that of any person merely on the ground of his being a creditor or friend of the deceased.

The eleventh section provides, that if any person, not being a Mahomedan or Hindoo, shall have died, and shall, if a British subject, have left assets exceeding the value of five hundred Rupees within any of the Presidencies, or any of the provinces or places subject thereto, or shall, if not a British subject, have left personal assets exceeding five hundred Rupees within the local limits of the jurisdiction of the Supreme Court at any of the Presidencies, and no person shall, within a month after his death, have applied for probate of a will, or for any letters of administration of his estate, the Administrator-General of the Presidency is required to take administration of the effects of such person.

The twelfth and fourteenth sections empower the Supreme Court to grant administration to the Administrator-General in all cases where the deceased's assets are in danger of misappropriation or waste.

These regulations form a *jus et norma* for ourselves also, if the necessity for the introduction of such a practice be equally demonstrable. This necessity, however, is just as cogent where the like circumstances exist, whether they occur occasionally only, as in this country, or constantly, as in India. In the interest of society, here equally as in India, care should be taken to preserve the helpless estate of a deceased, whenever circumstances tend to its jeopardy or destruction, and the propriety and justice of an early discharge of pressing claims

upon it, is in the same interest equally undeniable, while as regards the property of foreigners, the feeling of the *comitas gentium* should impel our Courts to adopt some such system for its protection as exists in most other countries of Europe.

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#### ART. VI.—FRIEDRICH CARL VON SAVIGNY.

**I**T is time that some special notice should be taken of one whose name is so widely known, and whose influence even in this country is so important, but as to whose character and history nothing has yet been laid before the English public. We propose, without attempting at present a full examination or criticism of his works, to give such an account of Savigny and of his opinions as our materials will permit.

Friedrich Carl von Savigny was descended from a family which took its name from the Castle of Savigny, near Charmes, in the valley of the Moselle. The Sieurs de Savigny are often named in the ancient records of Lorraine, and even in the Chronicles of the Crusaders, Andrew de Savigny (wrongly written Chavegni, Chavigny, &c.) having fought by the side of Richard of England against Saladin. When the Duchy of Lorraine began to break up, at the time of the Thirty Years' War, the family of Savigny adhered to Germany along with the reigning house, and thus escaped the annexation to France, which the gradual decomposition of the State slowly but surely brought about. In 1630, Paul von Savigny became attached to the princely house of Leiningen-Westerburg, served in the armies of France and Sweden, then the defenders of German Protestantism, acquired property at Calestadt, on German soil, and was buried in 1685 at Kirchheim, in Alt-Leiningen. In France the family was now regarded as extinct. Savigny's great-grandfather, the son of this Paul,



was in the service of the Prince of Nassau, and became President at Weilburg. He appears to have been a strenuous defender of the honour and integrity of Germany, and in a work entitled "*La Dissolution de la Réunion*," wrote vehemently against the ambition and tyranny of Louis XIV. His son, Savigny's grandfather, was the last soldier of the family, having served in the Imperial armies in Italy, in the Seven Years' War, and been present at the siege of Turin, by Rehbinder. He afterwards devoted himself to political life, held administrative offices in various small States, and died Cabinet Minister of Deux-ponts. He increased the German possessions of his family. His son held similar situations under various princely houses, and is said to have been a man of great personal worth and authority. He became a noble of the Empire, and was the envoy (*Kreisgesandter*) of several princes to the Diet of the Circle of the Upper Rhine, which latterly met at Frankfort-on-the-Maine. Here, on 21st February, 1779, was born the great jurist. He was indebted for much of the moral and religious earnestness of his nature to the early training of his mother, who taught him the French language, and took him to the French religious services held at Bockenheim, beyond the territory of Frankfort.

In 1791 and 1792, Savigny lost his parents, and was left, at the age of thirteen, the sole remaining scion of his family, but with a good fortune. His guardian, Herr von Neurath, Assessor of the Imperial Chamber (*Reichskammergericht*),\* at Wetzlar, took his ward into his house, and brought him up with his own son. From him the youths began, at the age of fifteen, to receive instructions in law. The worthy magistrate traced the subsequent fame of his illustrious pupil to his own teaching—an amiable hallucination which Savigny's grateful piety never allowed him to disturb. Herr von Neurath was really a learned man in the juris-

\* This was the Supreme Court for all Germany, having concurrent jurisdiction with the Imperial Council at Vienna.

prudence of the eighteenth century, being especially famous as a thorough proficient in the German *Staatsrecht* of the time.

“But,” says Professor Rudorff, “in these volumes, compiled in the axiomatic and mathematical method, cut up into questions and answers to be learned by heart, the youthful soul of the future master of jurisprudence for the first time felt with alarming distinctness the whole comfortless desolation and aridity of the legal learning of the time ; it was well for him to learn by his own experience how legal instruction, if it is to animate to independent thought, must *not* be communicated.”

At Easter, 1795, he proceeded to the University of Marburg. The smaller, half-rural universities of Germany have at least the advantage of bringing the students into closer personal intimacy with their teachers; and Savigny enjoyed such a friendship with Philipp Friedrich Weis, a civilian of the “positive, so-called elegant” school, which had still its adherents. Weis had a good library, ample learning, and, notwithstanding some eccentricities, the art of inspiring his disciples with an enthusiasm for legal study. In each of his earlier works Savigny gratefully mentions the incitement to it which he had received from Weis, and, “by the imposing scientific apparatus of MSS. *incunabula* and documents, which he has turned to account in all his writings, he proves himself to be Weis’s true and grateful disciple.”

Savigny studied at Göttingen in the winter half-year of 1796; but he found the lectures tedious or ridiculous. Having already completed his civilistic course, he did not attend the prelections of Hugo, then the ornament of that university. Only during one hour was he a hearer in Hugo’s lecture-room, and in after times that distinguished civilian used to point out to his audience the spot where Savigny had sat, thereby consecrated as the place of honour. Spittler’s gracious eloquence in the chair of Universal History was what most impressed Savigny at Göttingen, and to the impression made by it may partly be traced that clearness of style which distinguishes his works. For three years after this, Savigny’s

studies were considerably interrupted by ill-health, but much of his time was spent with friends, who, by their own confession, derived from him benefit and incitement not less than he owed to them. Among these are the names of Becker, Pourtalès, Von Motz, Heise, Clemens Brentano, H. Lichtenstein, Klingemann, Gries. He was not dead to the influence of the great poets of Jena and Weimar, then at their zenith of fame and activity. It was the powerful, and with him life-long impression made by Wilhelm Meister, in 1800, that roused him out of the somewhat aimless and disjointed life which his illness had for a time necessitated, and "restored him to himself and to solitude."

In 1800, Oct. 31, he took his doctor's degree at Marburg. His inaugural dissertation was "*de concursu delictorum formali*" (Vermischte Schriften iv. 74), a treatise on the violation of several criminal laws by the same act, *e. g.*, perjury, in consequence of which an innocent person is condemned to death. This is ranked but little below the level of his later works. In the following winter, Savigny lectured as Privat Docent in Marburg—the beginning of forty-two years of professional activity. He delivered but one course on criminal law, and afterwards applied himself to the civil law, which he treated after Hugo's method, historically, exegetically, and systematically. The lectures he delivered on this subject in the following years, as Extraordinary Professor, made a deep and strong impression.

"I know of no public speaking (*Vortrag*)", says Jacob Grimm, who with his brother had attended his different courses, "that has more deeply impressed me than the prelections of Savigny. I think what so strongly attracted his audience was his ease and vivacity of delivery, combined with so much quietness and moderation. . . . The constant clearness of his diction, the warmth of his persuasion, and withal a kind of reserve and self-restraint in expression, produced an effect which with other men is only the consequence of the most powerful eloquence."

From the same biography of the Grimms we learn that Savigny

spoke fluently and rarely consulted his notes. His French translator, M. Guenoux, received similar impressions in attending his lectures thirty years later. He was struck with the freshness and vivacity with which a course was delivered for the twenty-fifth time. Each year, however, added a new interest, in the results of new studies, and the latest discoveries of science. "His fluent and precise language," says M. Guenoux, "illustrates so well the most obscure subjects that his pupils discover their difficulty only if at a later period they have to seek for a solution which they have forgotten."

In these years, at Marburg, his courses were on the last ten books of the Pandects, Ulpian, the laws of succession, obligations, the methodology of law, and on Hugo's history. For the labours of Hugo, Savigny always expressed high esteem, and though not his pupil, he was aided and influenced by his writings and intercourse more than by any other modern jurist. But the achievements of Hugo were but negative. His criticism had exposed the defects of the German jurisprudence of the eighteenth century, but no constructive genius had yet given an example of a better science. That jurisprudence had almost forgotten the law sources; it had constructed a "conglomerate" of Roman, canon, and German law, without rejecting or distinguishing what had become obsolete, and had clothed the whole in a fantastic dress of abstract principles and technical phraseology. Handed down from one teacher to another, dissociated from the philosophical and historical science of the time, the German jurisprudence needed another Cujacius to transform it from a mechanical handicraft to be once more a liberal study, and an important element of national culture. The first step towards realizing the reform to which Hugo, Haubold, and Cramer had pointed the way, was made by the publication of Savigny's treatise, "*Das Recht des Besitzes*," certainly the greatest event that has occurred in legal history since the sixteenth century. It was a pattern of the new method of studying the law sources at first hand.

For some time Savigny had laid aside all commentaries, and had sought in the texts of the great jurists alone a firmer foundation for his knowledge. He did not neglect, either before or at a later period, the great modern interpreters of the Roman law, especially Cujacius and Donellus, but he felt the importance of regenerating civil law from the undiluted and unadulterated springs of antiquity. In preparing in this way his prelections on the last ten books of the Pandects, he first became aware of the vast distance between the doctrine of possession taught by the classical jurists and the traditional theories then received as to "that remarkable hybrid of fact and law." Encouraged by Weis, the preparations for restoring the doctrine of the ancients were begun in December, 1802. They were completed in five months, and in six weeks more the manuscript was finished. In so brief a time was produced this unequalled monograph, which has gone through seven editions, has been translated into English, French, and Italian, and which at once placed the author, at the age of twenty-four, among the classical writers of his country.

Savigny declined at this time invitations to Heidelberg and Greifswald. In 1804 he was married, at his estate of Trages, to Fräulein Kunigunde Brentano, sister of Clemens Brentano and Bettina von Arnim, a union which lasted till his death. After visiting Heidelberg, Stuttgart, Tübingen, and Strassburg, he went to Paris, in December, 1804. On the way thither, a box containing his papers, the fruits of laborious researches in the libraries of Germany, was stolen from behind the carriage. This serious loss, however, was in some measure replaced by the aid of his pupil, Jacob Grimm, who joined him at Paris. There, in that magnificent library, whose conservators are famed for even more than the proverbial courtesy of librarians, Savigny and Jacob Grimm spent their days. Madame Savigny and one of her sisters accompanied them, and copied many manuscripts; among others, the cramped handwriting of the unpublished letters of Cujacius. In the end of 1805 he returned to Marburg. His biographers give no account of his

occupation during the next two years,\* which are memorable for the humiliation of Prussia, and the complete establishment of French domination in great part of the Fatherland. Savigny must have watched with anxiety the events of that period, and he drew from them, doubtless, many of the lessons of patriotism and political wisdom which he afterward strenuously inculcated. It was a time of trial for all Germans, but it was also a time of hope to the thoughtful among them—a crisis in their history.

In May, 1808, he was appointed Ordinary Professor of Roman Law in the University of Landshut. He remained there but a year and a half, but that time was long enough for him to acquire the unbounded love of his students, whom he inspired with the same zeal, love of learning, and self-respect, that so many had carried away from Marburg. In the preface to the seventh volume of his system, there is a story of this time, which he tells to illustrate the error of those who, in their zeal for the Fatherland, assumed the existence of an antagonism between Roman and German law.

“ When I filled a chair in the Bavarian University of Landshut, forty years ago, there was there a Professor of Botany, who, be it observed, was not born a Bavarian. This man sought to manifest his exclusive devotion to the special Bavarian Fatherland, by banishing from the botanic garden all plants that do not grow wild in Bavaria, in order to have a home garden (*Einen zein Vaterländischen Garten*), free from all foreign productions. This course, however, was condemned by all true Bavarians in the University, who were certainly not wanting in the strongest attachment to their country.”

This is a curious example of the strange extremes into

\* In the singular history of the Canoness Günderode, prefixed to the “ Correspondence of Goethe with a Child,” Bettina von Arnim gives a curious account of her manner of life when in Savigny’s house at Marburg, and of the scenery there; but there is little relating to him personally, except that he was visited by Kreutzer. In the same book are various incidental allusions to Savigny and his family; *e. g.*, to a festival on his birthday, Feb. 21, 1808, which was attended by Goethe’s mother. (Letter to Goethe, March 15.) Others are cited hereafter.

which some natures were then led by the craving for a local nationality, and of the keenness of the provincial selfishness which has so retarded the growth of German unity. It would seem to point to some attacks on Savigny as a foreigner, which were rather ridiculous developments of patriotism in that newly formed and, as yet, incoherent kingdom. These attacks, or mislikings, must, however, have been exceptional, or at least they were soon overcome. His sister-in-law, Madame von Arnim, then lived in his family, and in her correspondence with Goethe she thus describes his departure from Landshut:—

“ The students are just packing up Savigny’s library ; they place numbers and tickets on the books, lay them in order in chests, let them down by a pully through the windows, where they are received underneath with a loud ‘ Halt ’ by the students. All is joy and life, although they are much distressed at parting with their beloved teacher. However learned Savigny may be, yet his affable befriending disposition surpasses his most brilliant qualities ; all his students swarm about him ; there is not one who does not feel the conviction, that in the great teacher he also loses his benefactor. Most of the professors, too, love him, particularly the theological ones. Sailer is certainly his best friend.

“ The swarm of students leaves no more the house, now that Savigny’s departure is fixed for a few days hence : they are just gone past my door with wine and a great ham, to be consumed at the packing up. I had presented them my little library, which they were just going to pack up also ; for this they gave three cheers. In the evening they often make a serenade of guitars and flutes, and this often lasts till midnight ; therewith they came round a large fountain, which plays before our house in the market-place. Yes ! youth can find enjoyment in everything : the general consternation at Savigny’s departure has soon changed into a festival, for it has been determined to accompany us on horseback and in carriages through the neighbourhood of Salzburg. They who can procure no horse, go before on foot : and now they are all rejoicing so at the pleasure of these last days, travelling in awakening spring through a splendid country with their beloved teacher.”

Nearly two months later, she writes :—

“ Shortly after Easter we took our departure ; the whole University was collected in and before the house ; many came in carriages and on horses ; they could not so soon part from their excellent friend and teacher. Wine was given out, and amidst continued cheers we passed through the gates. The horsemen accompanied the carriage up a hill, where spring was just opening its eyes ; the professors and grave personages took solemn leave, the others went one stage further. Every quarter of an hour we met upon the road parties who had gone on before, that they might see Savigny for the last time. I had seen already for some time the tempest clouds gathering. At the post-house one after the other turned towards the window to conceal his tears. A young Suabian, of the name of Nüssbaumer, the embodiment of popular romance, had gone far before, in order to meet the carriage once again. I shall never forget how he stood in the field and waved his little handkerchief in the wind, while his tears prevented him from looking up as the carriage rolled past him. I love the Suabians.”

Here follows a vivid personal description of some of Savigny's pupils, who accompany the party to Salzburg. Again :—

“ At sunrise we passed over the Salza ; behind the bridge is a large powder magazine. There they all stood, to give Savigny a last cheer ; each one shouted forth one more assurance of love and gratitude to him. Freiberg, who accompanied us to the next stage, said, ‘ If they would only so cry that the magazines should burst, for our hearts already are burst ;’ and now he told me what a new life had blossomed forth through Savigny's means ; how all coldness and hostility among the professors had subsided, or was, at least, much assuaged, but that his influence had been chiefly salutary for the students, who, through him, had attained to far more freedom and self-dependence. Neither can I sufficiently describe to you how great is Savigny's talent in managing young people. First and foremost, he feels a real enthusiasm for their efforts, their application. When any theme which he proposes to them is well handled, it makes him thoroughly happy ; he would fain impart to



each his inmost feelings ; he considers their future fate, their destinies, and a bright eagerness of kindness illumines their path."

Professor Rudorf describes with pardonable partiality that great Prussian or rather German movement for national culture, morality, and religion, as well as for outward freedom and worldly goods, which originated in the oppression of Napoleon, and culminated on the battle-fields of 1813. The most valuable fruit of French conquests in Germany was the conviction that complete national union, and the renunciation of all narrower interests and prejudices, were alone sufficient for the last desperate conflict with the invader. To confirm this patriotic spirit, and to elevate the standard of moral and intellectual education, the University of Berlin was founded in 1810. Suggested by Wolff, when the University of Halle was uprooted by the French, then advocated by Müller, Humboldt, and Stein,\* this first experiment of a *Hoch-schule* in a great city was endowed, in 1809, with a royal grant of 60,000 dollars a year, and the gift of Prince Henry's palace. "It was the highest example," says Fichte, "of a practical respect for science and thought ever afforded by a State, for it was given during a period of the direst oppression, and under the greatest financial difficulties ; and it was not a matter of display or of elegance that was sought for, but a means of giving health and vigour to the nation." It was a proof that the oppressed and humbled country was to be raised from the dust not so much by physical as by moral force. It was a conversion of Berlin from the French spirit and habits of thought which had possessed it since the time of the great Frederick, to be the centre of *German* intelligence.

Along with such men as Fichte, Schleiermacher, and Büttmann, William von Humboldt, the Minister of Public Instruction, named Savigny to the King, as the man in all Germany best fitted to direct the whole study of jurisprudence. "This

\* For a curious account of Wolff's conversion of Stein, who had been opposed to the plan as dangerous for the morality both of citizens and *Burschen*, see Russell's *Modern Germany*, ii. 58.

man," said the minister, "known by various universally admired works, must justly be ranked among the most eminent living jurists of Germany; indeed, with the exception of Hugo, of Göttingen, no one can be compared with him, since he is distinguished as well by the philosophical treatment of his science as by his genuine and rare philological learning." In May, 1810, Savigny left Landshut, and in June became a member of the commission for organizing the University of Berlin.

One of the first cares that engaged his attention related to the constitution of a *Spruch-collegium* (Collegium Juridicum) in connexion with the Juridical Faculty. The share which the German universities took in the administration of justice is a curious feature in their history. Originating, probably, in Italy (*Geschichte d. R. R., in Mittelalter*, vol. iii. § 86), this system was widely extended in Germany. There the *Spruch-collegium* had not a jurisdiction; but courts were authorized to communicate to it the documents and pleadings (*Acten-versendung*) in any cause, and were bound to accept and promulgate its decision. In some parts of Germany this reference was made at the desire of the parties, in others it belonged to the *officium* of the court; but in all cases the latter alone designated the faculty, the parties having the right of declining thrice (*jus eximendi*). The University of Berlin being the first foundation of the crown of Prussia, and not deriving its charter from the emperor, there was some hesitation as to giving it a *Spruch-collegium*, chiefly, it appears, because Frederick II., in his law reforms of 1748, had declared the awards of universities to be incompatible with the strict observance of the Prussian law. Savigny, however, saw in this institution not only an important auxiliary to legal education, but also an organ by which scientific law might influence practice. He thought the new university was bound to improve and elevate this agency, which had been subject to many abuses, and to use it for its highest purpose, "to produce a life-giving co-operation and mutual influence of theory

and practice." It was one of the main objects of his life to counteract that ever widening gulf between theoretical and practical law which he saw to be the crying evil of German jurisprudence. Next to the study of that body of law, in which principles were most intimately combined with their application, he knew no better remedy than in the proper regulation of an institution which connected teachers and speculators with the actual affairs of the world.\* In a university founded for such ends as that of Berlin, he was the more ready to yield to his natural tendency, and to postpone the special laws and apparent interests of Prussia to the general weal of Germany; and he felt that the real interest of Prussia lay in leading, not in keeping aloof from the nation. He succeeded in establishing a *Spruch-collegium*, composed of all the ordinary professors of the faculty of law, and entitled to deal with cases remitted from other German States than Prussia. In it Savigny himself, although free to decline its duties, laboured with such zeal that 138 reports, in his firm, clear handwriting, exist in the first three volumes of the archives of the Faculty, dating from its foundation to his retirement from it in 1826.

Nor in the teaching of law did he submit to the natural tendency to give the first place to the municipal code of Prussia. He insisted on the appointment of another "Romanist;" and Hugo, Heise, and Haubold having declined, he obtained the younger Biener. On 10th October, 1810, he began his own winter lectures, on the Institutions and the History of Roman Law, before forty-six students, among whom were Göschen, Dirksen, von Rönne, von Gerlach.

Immediately after his arrival at Berlin, he became acquainted with Niebuhr, who speaks in his Roman History with affectionate gratitude of the learned intercourse he enjoyed with Savigny, and who always considered himself deeply indebted to him for the acquisition of new ideas, as well as for a sympathy that was the best stimulus to his genius. (Life and Letters of Niebuhr, i., 305, Engl. tr.) Savigny attended in

\* Comp. Syst. i. Vor. p. xxi.

that first winter his lectures on Roman history. "Thus arose," says Professor Rudorff, "that mutual interpenetration of Roman law and Roman history which still characterizes, in an equal measure, the writing of Roman history and Roman jurisprudence." In summer, 1811, began the personal contact of Savigny and Eichhorn, who then came to Berlin to teach German jurisprudence. Taking the same views as Savigny as to the origin of positive law, Eichhorn did for the regeneration of his own department nearly what Savigny did for the modern Roman law. The former built upon the method and discoveries of Jacob Grimm, as the latter was aided by those of Niebuhr.

In the first election of a rector for the new university, eleven votes were given for Fichte, and ten for Savigny; but as the former desired to be relieved from the burden of public business, the office fell to Savigny as second in order. It was now the era of "Liberation," and his term of office was made illustrious by the empty halls of the university; by that "*frequentissimarium scholarum fausta infrequentia*, in which," says the biographer, "the rector announced the prelections in the catalogue, but himself held none, because in the previous winter he had read the Pandects before but ten students, all disqualified for military service;" and he himself was now an active member of the committee for organizing the Landwehr and Landsturm of Berlin.

In 1814, and for some years after, he was tutor of the Crown Prince in Roman, criminal, and Prussian law. In the same year appeared his famous pamphlet, "*Vom Beruf unseres Zeitalters für Gesetzgebung und Rechtswissenschaft*." There was a very general feeling in Germany in favour of internal unification by means of a code. Some wished to adopt that promulgated in Austria in 1811; others to form a new one; and Thibaut, who first gave expression to the common desire,\* hoped that the representatives of the different States then

\* "*Ueber die Nothwendigkeit eines Allgemeinen bürgerlichen Rechts für Deutschland*," in *Civilistische Abhandlungen*, pp. 404—466.

assembled at the Congress of Vienna would help to realize it. This distinguished jurist was a warm and genuine patriot, as his great adversary in the "friendly struggle"\* was ready to confess; but he belonged to that philosophical school, fed on the theories of the eighteenth century, which believed that law can be produced, of the desired quality and at the shortest notice, on any soil. This belief was an offshoot of that extraordinary presumption, born of intellectual conceit and the pride of knowledge, which, in alliance with the maniacal strength of human misery, achieved such a mighty revolution in religion and politics, and which, having lost all respect for a past that seemed prolific only of abuses, imagined the present capable of realizing absolute perfection. It placed the end and goal of jurisprudence in a universal code for all nations and all times; a code so complete as to give a mechanical guarantee for equity and justice, and it demanded, in that spirit, a common legislation for Germany.

Savigny's reply was in the spirit which the 19th century was already bringing to bear on philosophy, science, and literature. It was an application and development of the lessons of Vico and Montesquieu, which may be summed up in that thought of Pascal, which considers, "*toute la suite des hommes pendant le cours de tant de siècles comme un même homme qui subsiste toujours et qui apprend continuellement.*" The past was not to be studied merely that abuses might be exposed, or an imaginary perfection idolized; it was to be examined with a profounder attention, as the parent and nurse of the present and the future. Old things were regarded as the foundation of new, instead of being swept away with the besom of destruction, in order to make room for them. In fine, then arose that school which has not yet accomplished its work, which inculcates reform instead of revolution, a historical school, whose functions are not confined to the realm of jurisprudence.

\* Niebuhr (*Life and Letters*, ii. 268 Engl. tr.) calls it "an acrimonious contest, which, however, terminated reasonably."

With a more loving regard for the past, a more earnest devotion to his own science, free from the spell exercised by the dream of mere outward uniformity, Savigny came forward as the champion of the common law; recognizing indeed the value of legislation and codification, but requiring the former to proceed from the opinion and wants of the nation itself, and placing the latter in its true position, as a question of expediency, not a matter of necessity. He showed that legal science was only in its infancy; that it would be folly to stereotype and fix for ever a state of the law obviously so imperfect;\* that Austria and Prussia would not give up their own new codes; and that, therefore, any attempt at general codification would most probably result in a permanent division of the nation into two halves. He pointed out the defects in all previous attempts at codification—in France, Austria, and even in Prussia. He showed that the want and the vocation of the age was rather for progress in a common jurisprudence; and he maintained, with an earnestness and conviction that arose from a worthy but modest self-consciousness, that the nation had yet freshness and vigour enough to produce great jurists, and an intellectual fecundity that would only be hampered by the codifications that suited ageing nationalities. In his view, “the call for codes arose from indolence and dereliction of duty on the part of the legal profession, which, instead of mastering the materials of the law, was overpowered and hurried headlong by their overwhelming mass.”

Savigny's view of the whole subject of codification was based on his conception of the nature of private law, as originating directly from the people. Whatever may be the functions of the State in ordering and protecting its own existence through public and criminal law, private law proceeds

\* “Optandum esset, ut hujusmodi legum instaurationis illis temporibus suscipiatur, quæ antiquioribus quorum acta et opera tractant, literis et rerum cognitione præstiterint. . . . Infelix res namque est, cum ex judicio et delectu ætatis minus prudentis et eruditæ antiquorum opera mutilantur et recomponuntur.”—Bacon de Augm. Sc. L. 8 c. 3 (quoted by Savigny *Vom Beruf, &c.*, p. 21).

immediately from the actions of individuals. The customs and precedents, the usages of merchants, and those of courts, are not merely the primitive, but the permanent organs of legal progress.

He did not conceive the law as immutable, an heirloom that must not be bartered or changed. This charge against the historical school was unfounded. "The human body," he said (*Zeitschr* iii. 4. *Stimmen für und wider neue Gesetzbücher*), "is not unchangeable, but is incessantly growing and developing itself; and so I regard the law of each nation as a member of its body, not as a garment merely that has been made to please the fancy, and can be taken off at pleasure and exchanged for another." He pointed out, too, the source of the whole agitation for codes, the attempt to rectify the law from above and at one stroke, in the tendency of the time, "alles zu regieren, und immer mehr regieren zu wollen."—(Ib. p. 44.) In fine, he pointed out that the "historical spirit is the only protection against a kind of self-deception, which is ever manifesting itself in individuals as well as in whole nations and epochs—that which makes us fancy what is peculiar to ourselves to belong to universal humanity. Thus, in time past, some, by leaving out prominent peculiarities, made a system of natural law out of the Institutes, and deemed it the very voice of reason; now there is none but pities such an error; yet we every day see people hold their juridical notions and opinions to be rational only because they cannot trace their genealogy. Whenever we are unconscious of our individual connexion with the great universe and its history, we necessarily see our own thoughts in a false light of generality and originality. Against this we are protected by the historical spirit, which it is the most difficult task to turn against ourselves."—(*Vom Beruf*, 115.)

It was not surprising that Savigny's views should kindle opposition among the numerous party interested in maintaining the principles of the French rule, who hoped to be allowed to apply these principles for their own interests as



soon as the old German tendency to isolation of races and territories again dared to manifest itself. Professor Gönner, of Landshut, a representative of this class, accused Savigny of democratic views, and a desire to place the sovereign prerogative of legislation in the hands of the people and its jurists. He considered a code for all Germany inconsistent with a federation of sovereign states.\* He desired to obliterate every trace of common nationality, and the very appearance of State subjection, although he had pressed on the States forming the Confederation of the Rhine the uniform adoption of the Code Napoléon, pure and simple. Savigny's reply† was crushing. He insisted on freedom as necessary for the development of law, as well as other functions of the intellectual life of nations. But he urged above all the preservation of every institution that supported or confirmed the national unity. He knew how important it was to withstand that spirit of "particularism" which is unable to see the wood because of the trees; he was fully aware of the value of local and municipal institutions, but he felt that unity was of still more vital importance to his country.

For the maintenance of such principles and the cultivation of historical jurisprudence, Savigny, Eichhorn, and Göschen had established in 1815 the "*Zeitschrift für geschichtlichen Rechtswissenschaft*." The same objects which this journal had in view were still more efficiently aided by the great works of its chief conductors, Savigny's "*History of Roman Law in the Middle Ages*," and Eichhorn's "*Deutsche Staats- und Rechtsgeschichte*." Savigny's third great work exhibits the strange and unexpected result of the continuity of the Roman law during the darkest period of European history; and it depicts its resurrection and second life in the jurispru-

\* Similar was the view of Almendingen (*Politische Ansichten*, Wiesbaden, 1814), who applied the "national theory" of law to the little states of Germany, confounding the notions of state and nation, and demanding a special code for each state.—"*Ein neues Trennungsmittel für die Deutschen*," *Zeitschrift*, iv. 32.

† *Zeitschrift* vol. i. *Verm. Schriften*, iii, No. 52, p. 167.



dence and literature of the Middle Ages. Professor Rudorff ascribes it to a special interposition of Providence in behalf of the historical school, that just when the veil had been lifted from the Middle Ages by the gigantic labours of Savigny, the obscurity that had enveloped the more remote antiquity of the Roman law was in great measure dispelled by the discovery of the institutions of Gaius. The Roman law was thus traceable in its whole growth, from the old forms of the Republic, through the remains of the classical jurists, the Pandects of Justinian, its flickering life in the church, the municipalities, and the universities, till its revival in the schools of Bologna, and its reasserted predominance in the tribunals of the Germanic empire. We quote here the eloquent words of Professor Rudorff in describing the historical school:

“The masters of the older schools had acknowledged only statutes as sources of law. The primitive customary law growing up out of the autonomy of individuals and the decisions of judges, and the legal profession, the natural representative of the nation in legal affairs, had in their eyes a scarcely tolerated existence. An international law without the State they were in all consistency obliged to deny. Now, the municipal law escaped from that legislative arbitrariness, that system of constraint in the domain of law, as theoretical politics shook off the arbitrary doctrines of the social contract or of conquest,\* as historical literature shook off the *pragmatismus* which pretended to explain everything by individual purpose and deliberate design. Law stepped out into the general highway of intellectual history, and the more precise formulation of the law giver, who stands in the centre point of his people and his history, appeared henceforth but as *one* of its manifold organs.

“The previous jurisprudence was wholly dogmatic, and its dogmas consisted only of wearisome logical categories, and rules for interpreting the legislative will. The jurists of the 18th century wanted altogether the historical and even the genuine systematic sense, which deals with what is organically connected. The history of law to the rationalist lawyers was only a catalogue of the aberra-

\* See Savigny's System, i. 32.

tions of the human mind; to the positivists it was a worthless collection of defunct and useless antiquities. The historical school restored to jurisprudence, besides the juxtaposition of cotemporary facts, the regular succession of a series of varying forms, in which we become aware of the presence and operation, from first to last, of the same national life, uniting, individualizing, developing the whole. To it legal history is no longer dead matter. It knows only an immanent, not a transitory past, the knowledge of which is no superfluous, or at the best useful, preparation; but the whole of jurisprudence is as much history as system, only a different arrangement distinguishes the freedom of historical development from the necessary and well-proportioned systematic unity of the manifold institutes."

Perhaps the most plausible objection to the historical school was founded on its supposed want of all higher philosophical thought. It was accused of standing aloof from the ideal. The works of Savigny alone, full of the soundest philosophy, stated in the most transparent style, are enough to refute this notion. The historical school only demands division of labour; it asks to have its own office duly appreciated, but it does not pretend to exist without using the aid of a rational and reflective jurisprudence. The two tendencies are inseparable as soul and body. Savigny confined himself with rare self-denial to the exposition of the law on its historical side, and in its external form. He never loses sight of the worldly interest of his subject in "speculations on the philosophy of legal history or the physiology of peoples, nor obscures the classical simplicity of his outlines by metaphysical deduction, the romance of theological colouring, or the dangerous play of etymological fancy." His own answer to the want of philosophical thought with which his history has been charged, stands in the *Zeitschrift*, iii. p. 5.\* "No confusion," he says, "is more pernicious than that of micrology with special knowledge of details. Every reasonable man must estimate micrology at a very low value, but accurate and minute knowledge of details is so indispensable in all history that it is the only

\* Lerminier, *Hist. du Droit*, p. 355.

thing that can give it value. A legal history not based on this thorough investigation of particulars can give, under the title of great and powerful principles, nothing better than a general and superficial reasoning on half-true facts—a procedure which I deem so barren and fruitless, that, in comparison with it, I give the preference to an uncultivated empiricism.”\*

He belonged to none of the great schools of philosophy which rose and fell during his long lifetime. But there is a lofty ideal present and often visible in his works. He conceives law as having its end and aim in man’s moral nature—as being the realization or rather the servant of “*das Sittliche*.” But as morality is now inseparable from Christianity, he finds the highest motive of the law in the deeply ethical spirit of our religion. In a remarkable passage,† written at a much later period of his life, after comparing the positive and rational sects of lawyers, those who regarded only the individual and national, and those who chiefly contemplated that which is common to human nature, after recognising an element of truth amid the one-sidedness of both parties, and rejoicing in the prospect of progress afforded by their approximation, he proceeds thus:—

“The universal office of all law may then be referred simply to the moral determination of human nature,‡ as it appears in the Christian view of life. For Christianity is not merely to be acknowledged as the rule of life, but it has in fact transformed the world,

\* The application of these principles to the History of Roman law in the Middle Ages will be found in a letter of Savigny, cited in the “Notice” in the French translation, p. 21.

† *System*, i., 53.

‡ This phrase is explained at a subsequent part of the same volume (p. 381). “Man is placed amid the external world, and the most important element in this surrounding is his contact with those who are his fellows in nature and destiny. But it is possible for free beings to co-exist in such contiguity, mutually benefiting, and not hindering each other in their development, only by recognition of an invisible boundary within which the existence and the activity of each individual may obtain secure and unembarrassed scope. The rule by which that boundary, and by it that free space is determined, is the law. This implies at once the affinity and the difference between law and morality. Law serves morality, not however by executing its commands, but by securing the free development of its power residing in every individual will.”

so that all our thoughts, however alien or even hostile to it they may appear, are yet controlled and pervaded by it. By this recognition of its universal end and aim, law is not absorbed in a more extensive domain, and robbed of its independent existence; it is rather a distinct and peculiar element in the successive conditions of that general problem; it has unlimited sway within its own province, and it only receives its higher truth by its connexion with the whole. It is amply sufficient to admit this one aim, and it is unnecessary to place by its side a second of a totally different kind under the name of the public weal; to assume in addition to the moral principle one independent of it in political economy. For, as the latter strives after the extension of our dominion over nature, it can only tend to increase and ennoble the means by which the moral ends of human nature are attained. But this includes no new aim."

And the author goes on further to distinguish the general and particular elements of law, and to show that one of the principal functions of legislation is to regulate their reciprocal action, to reconcile them into a higher unity, preserving the philosophical principle, without killing the national spirit and individuality. We have been insensibly led to anticipate by quoting from Savigny's philosophy of law as it was twenty-five years later. But it was not in substance different from that of the "*Beruf*" and the "*Zeitschrift*." It was only mellowed and enlarged by experience and riper knowledge.

The polemic against the historical school gradually ceased as its profound scientific theory was disseminated more and more widely by the works of Savigny and Eichhorn, by Biener in criminal law, Bethmann-Hollweg in the law of judicial procedure, and by many others, till it has become the common property of all. Englishmen have always had a holy awe for precedents, and have studied their own past in a reverend and yet independent spirit, which makes it difficult to say whether they more highly esteem the past because it is the parent of the present, or the present because it is the offspring of the past. Their theory of law (if they can be said to have had one) was ever that expressed by Sir James Mackintosh. "There is but

one way of forming a civil code, either consistent with common sense, or that has ever been practised in any country, namely, that of gradually building up the law in proportion as the facts arise which it is to regulate." It is difficult for them, therefore, to realize the difficulty and importance of the task which the historical jurists accomplished. But for Jeremy Bentham it would have been more difficult still. The long cessation of all improvement had opened so wide a gulf between the law and the wants and sentiments of the nation, that Bentham and his school saw no better way of filling it up than by overthrowing the whole fabric of the ancient jurisprudence, and rearing a new system out of human brains. Happily this was not necessary. Bentham's writings gave a mighty impulse to legislation, which had so long been idle or mischievous; but they did not lead us either to revolution or to wholesale codification. He had indeed fallen into the same idolatry of his own genius, and the same oblivion of the claims of the past, of which the continental theorists were guilty. But his mistake was counteracted in great measure by his laying down as the guiding principle a lower, or at all events a more practical object, the happiness of mankind. This principle, abstractly less perfect, but actually less liable to perversion than the transcendental or *à priori* systems of the last century, far more than his elaborate codes, has mainly influenced the legislation of the last thirty years in Great Britain.

But the external circumstances of Germany differed still more widely from ours than their juridical habits and position. There abuses were greater, attachment to existing institutions feebler, the spirit of speculation more powerful, and French example more infectious. The tendency, therefore, was to systematize: codes were actually formed and enacted in Prussia and Austria; and it is owing to the labours of Savigny and his followers that the whole law of the country, except such code, has not become a blank. It is no derogation from his transcendent merits, to say that much of the success he

won arose from his clear perception that the cause of the common law was the same with that of national unity, which exerts so strong an influence on the German mind. The German States and the two divisions of this island occupy converse positions. Here there is political union, legal and educational separation; there the common law and the universities are the great bonds of union, and Savigny and his school were thus able to persuade a nation, one of whose cravings is for the political unity they have not, to stand by the institutions which feed and stimulate that desire.

How so great a mind as Savigny's should devote itself to a field apparently so narrow as the Roman law; how a spirit so patriotic should so reverence what seems foreign and antiquated, can be strange only to those who have superficial notions of the power and value of that system, which has been to modern jurisprudence far more than Plato and Aristotle to modern philosophy. Especially in the Germanic empire, which the Middle Ages regarded as the centre of Christendom, as the author and dispenser of the only true law, amid the discordant variety of national and tribal customs,—especially in Germany, was the Roman law a principal element of national education. To expel it in accordance with the fancied requirements of nationality and of the age, would have been as impossible and chimerical as the extinction of other foreign elements of culture that had taken root in the soil,\* such as the influences of classical antiquity, the poetry and art of Italy, or Christianity itself. “For,” says Rudorff, “it is just the exotic plants in the provinces of religion and law that are the noblest of all that grow on German soil. Their extinction must reduce us to barbarism. Their bloom is the ornament and the honour of our people.” Savigny has expounded his own views of the present position and value of Roman law with dignity and conciseness, in the prefaces to the first and seventh volumes of his system. He disclaims every thought of exalting the Roman jurisprudence at the expense of the

\* System, vol. i. Vorr. p. xxxi. vol. vii. Vorr. *vide ante* p.

German; but he desires that the intellectual gifts God has given to other nations and times should not be contemned or excluded, and therefore he prizes the Roman law. But he estimates it still more highly because "for us Germans, as for many other nations, this foreign element centuries ago became a part of our legal life, and thus, mistaken or half understood, it often has pernicious effects, where, if rightly apprehended, it can only enrich our proper legal life. We have not to ask, therefore, whether we can neglect or ignore the Roman law, like some newly-discovered island, or whether we shall strive to appropriate it with all the benefits and the difficulties which it may involve. We possess it already; our whole juridical thought has grown up with it, and the only question is whether our minds shall be unconsciously subjugated by it, or rather in full consciousness be strengthened and enriched."\*

But Savigny was not attracted only by the historical importance of the Roman law; he heartily recognised its value as an example. He saw in it the finest specimen of the union of theory and practice, which in Germany were separated far more widely, or at least more obviously than in this country, where theory has hardly a status or a follower peculiarly its own. He urged on his students an earnest study of the Roman jurists, just as we study other productions of antiquity with delight and admiration. He demands this, not in order to apply them practically, but to acquire the logical acumen that pervades them, and to learn to manage our much richer materials with like deftness and safety. To him a superficial knowledge of their general principles seemed but lost labour.†

\* *System*, vol. vii. Vorr. p. 7. The thought expressed in the last words is more fully developed in various passages of his writings. The point of view from which Roman law is regarded by a German lawyer is essentially different in this respect from that of the Englishman. Yet amid the attention which it is now receiving in this country, the views of Savigny as to its influence and position are of great interest and importance. They should be compared with those of Mr. Maine in his "*Ancient Law*," and in his paper in the "*Cambridge Essays*," for 1856.

† "There is an opposite and widely spread opinion that the Roman law can and must be taken more easily, that we may be satisfied with what is called the spirit of it. This spirit consists of what are called institutions, which may be useful to enable us at first starting to find our bearings: the



Such were the profound and earnest views of Roman jurisprudence that Savigny's flowing eloquence conveyed to the youth of Germany. He had the most extraordinary gift of oral teaching.

"The very external nobility of his appearance, the stately classical repose, the gentle earnestness of his personal bearing, could not but win the youthful heart to himself and the science he taught. Borne on the deep musical tone of his voice, the lecture, perfectly free, yet ready for the press, flowed on with magic ease, clearness, and elegance. Still more satisfying was the master's constant incitement to independent thought. Principles were laid down clearly and simply, but the most lively exegesis led directly into the casuistic workshop of the Roman jurists. It taught the hearers to apply those principles; and the wise restriction of the matter, instead of complete satisfaction or satiety, produced ever a new desire for further progress."—(Rudorff, p. 47.)

His views of the professional office were very elevated. He addressed himself especially to the middle classes, which, he said, were most susceptible and most in need of a stimulus to higher things, and whose spiritual guidance is the most important. He held in his "Essay on German Universities" (*Verm. Schriften* iv., No. 43, pp. 307, 308), that for their sake the teacher is called upon to strive after genuine popularity. In the university, as in the State, strength and permanency depend not on "heroes and statesmen, on artists and men of learning and genius, nor yet on the hewers of wood and drawers of water, but on the numerous intermediate class that devotes itself to intellectual labours, to agriculture and trade, in innumerable forms and ranks, and on the sound sense and active disposition that prevail among these orders."

When we consider the marked separation between the literary and the working and trading public of Germany, this

most general notions and propositions, without critical examination, without practical application, and above all without looking to the law sources from which all first acquires true life. This is quite useless and if we will do no more, even this little time is entirely lost."—*Beruf.* pp. 124, 125. *Comp. Syst.* vol. i., *Vorr.* p. xxvi.



appreciation of the middle classes by one of the former is noticeable. Mr. Laing and Mr. Buckle have pointed out how the thinkers of that country address a narrow and highly cultivated order; and thus, writing only for each other, have come to use a learned language almost unintelligible to the mass of their countrymen. The effect of the wide separation of the speculative and the practical classes is seen in the wildness of philosophical thought, and in a disregard of the traditional feelings of the vulgar. In such feelings, in the instinctive veneration for the past which appears in itself so unreasonable, we have the main security for the order and permanence of society; and it was not the least of the services of the historical school that it gave a rational foundation to this vague and superstitious reverence. Thinkers, cut off from the influence of popular prejudices, were for remodelling the world, at least the world of jurisprudence. Savigny and his fellow labourers transferred a prejudice from the minds of the people into the schools of philosophy and the councils of princes, stripping it of its fantastic ornaments, and presenting it in the naked simplicity of scientific truth. Indeed, the vulgar, in its blind veneration of what has been, is in one respect superior to the "unhistorical" sect. The continuance and power of that sect arise simply from the fact that so many unconsciously confound their own personal contemplation of the course of the world with the world itself, and thus, as Savigny has expressed it, "deceive themselves into the imagination that the world has commenced with them and their thoughts. Of course, none of them are conscious of this; it remains an obscure feeling that comes to light only in special instances, but the fact is proved by more than one literary phenomenon of the century." It is the same incapacity to realize the element of time as a factor in all mundane results, which Lessing describes in a famous passage\* as the

\* "Have you ever read a paper of Lessing's which alarms pious persons, but is none the less worthy of a profound philosopher—*Die Erziehung des Menschengeschlechts*? There is in that paper a sentence of the deepest significance. 'The enthusiast,' he says, 'and the philosopher are frequently

characteristic of the enthusiast. We shall see immediately how Savigny's share in the affairs of the world helped to save even him from some of the errors of the solitary student.

Savigny, like Arnold and John Wilson, like Fichte, Schleiermacher and Neander in his own university, exerted even a greater influence by his qualities as a teacher, than by his learning and genius. He aimed at cultivating the heart as well as the head, and the success of this system is evidenced by the position he occupied for two generations; for so long he was the chief name and authority, not only in his own department, but for the whole extent of jurisprudence; not only in Germany, but among cultivated jurists of every land. Italy, to attend whose legal schools crowds of northern students crossed the Alps in the Middle Age, has adopted his system as a text-book in the mother school of Bologna. In the sixteenth century, the civilians of France were the leaders and the lights of jurisprudence; but now Goethe could say, "Although in olden times they (the French) did not dispute our diligence, but yet regarded it as tedious, and burdensome, yet now they esteem with peculiar regard those works which we also value highly. I refer especially to the merits of Niebuhr and SAVIGNY."

Besides this life of learned labour and intellectual influence, Savigny's character received a fuller development by his share in public business. In 1817, he was appointed a member of the Department of Justice in the Council of State (*Staatsrath*). In 1819, he became member of the Supreme Court of Cassation and Revision for the Rhenish Provinces. In 1826, he became a member of a commission of high state functionaries, for revising the Prussian Code. These accumulated labours caused a nervous complaint, which rendered necessary, from 1825 to 1827, more than one lengthened residence in Italy.\*

only at variance as to the epoch in the future at which they place the accomplishment of their efforts. The enthusiast does not recognise the slowness of the pace of time. An event not immediately connected with the time in which he lives is to him a nullity.'"—*Niebuhr's Life*, ii. 242, English translation.

\* At this time, he seems to have been exposed to various annoyances, and Niebuhr urged him to renounce his political entanglements, and to retire to

To this enforced leisure, his country owed the papers on the German universities and on legal education in Italy, which were first published in 1832. While his official duties may have given less time for the pursuits which were more properly his own, he himself estimated them very highly, as means of intellectual growth and invigoration. He writes, in his essay on the universities, "Kept within proper limits, this disturbance may afford a wholesome counterpoise to the one-sidedness of a class of learned men, and thus by extending the view, and by imparting life to the mere study of books, exercise the most salutary influence on the educational profession." (Verm. Schr. v. 297.) In the same place, however, he warns that the participation in active business must not be allowed to engross too much time, strength, or interest, to the detriment of professional duties. "However decided," he says, "may be the call to active life, the duty of the teacher is too earnest and too honourable to be fulfilled but with perfect strength and devotion; and he who regards the matter honestly and conscientiously, will rather renounce it, than degrade it by careless and imperfect performance."

Very early Savigny recognised the importance of free institutions to the legal profession, and to the law itself. "What have we jurists to cling to," he wrote in 1816, "and raise ourselves up to? What helps in England, and what helped in the old free States, were free home-born forms of government, with an inheritance of national usages (*Volkssitte*), which draw fresh life from their very exclusiveness; of such means we have none." He found the only substitute for them in the scientific spirit which has produced so many excellences and defects in German jurisprudence.

He also points out very clearly the advantage of participating in political power, as an element in the cultivation of all classes. This argument ought to have had some weight in favour of

a life of study at Bonn, where he himself had then settled. From another letter of Niebuhr, it would seem that Savigny's health had improved under homœopathic treatment."—(Life and Letters, ii., 354, 368, English trans.)

popular government where education is so highly prized as in Prussia. But for generations it has been a political axiom at Berlin "to do everything for the people, nothing through the people;" and Savigny was not free from this prejudice of his country. Some of his views were expressed, we cannot help thinking, in a way that could only aggravate the unpracticalness which has retarded the progress of German constitutionalism. In England, the people has always sought for "material guarantees" for liberty, without probing too deeply the ethical or metaphysical springs on which they depend. If we were now struggling for popular institutions, we should not highly appreciate the doctrine, "that the antithesis of despotism and freedom can be conceived in conjunction with the most various forms of constitution. An absolute monarchy may, from the spirit of its government, be free in the noblest sense, just as a republic is capable of the severest despotism; although, indeed, many forms are more favourable to the one or the other of these conditions." This is a clear statement of an important truth; but is a symptom of that fulness of knowledge which overshoots the mark of practical utility—that completeness of theory which omits to make provision for the wants of every-day life.\* What was needed in Germany was the strong conviction and the authoritative exposition of the truth conveyed in the saving clause which closes the sentence. England reserved the assertion of the general truth, that tyranny was equally possible under a democratic and a monarchical government, and contented herself with securing the best safeguards for her own liberties, in an equitable counterpoise of classes.

Here is another doctrine which may be appreciated, but can hardly be beneficial in Germany, namely, that the difference between despotism and freedom is simply, that "in the one case the ruler regards the nation as inanimate matter with which he may deal as he pleases, in the other as an organism of a nobler

\* We find the same views in Savigny's *Philosophy of Law* (System i., 39, 40), in a less objectionable position.

kind, at the head of which God has placed him, of which he is an organic part," but whose powers, bestowed by nature and developed in its history, he is bound to respect.\* In this creed we detect a bias to that divine right which plays so important a part in Prussian politics. However imperfect, or, rather, ill-timed, the expression of these truths may seem to our apprehensions, Savigny did influence wisely and powerfully the constitutional tendencies of North Germany. He showed clearly in his paper on the municipal institutions of Prussia,† that there was no necessary opposition between monarchy and the democratic elements of nations; rather that monarchy, instead of being endangered by their operation, may draw life and strength out of them. There is, however, a propensity to confine the democratic forces to parochial and municipal administration, and leave to the monarchy the unchecked disposal of the central government. "It is," he says, "in the communal institutions that these democratic institutions can exert their influence with a more natural and more wholesome effect than elsewhere. The origin of the error (an absolute contrast between the democratic and monarchical elements) lies in the confusion of two quite different political antitheses—the distinction of monarchical or republican constitution, and that of a more central or local administration." We should also notice his urgent inculcation of earnestness and conscientiousness in the use of political power, addressed to the teachers and students of the German universities.‡

After making every allowance for the faults and errors, some of which have been noted, the works of Savigny probably contain larger stores of political wisdom than those of any lawyer, except one or two of the great luminaries of English jurisprudence. He is equally distant from those extreme sects of which the one knows no past, and the other can conceive of no future, because the former ignores or denies

\* Zeitschrift, i., 386. Verm. Schrift., v., 131.

† Verm. Schrift., v., 208.

‡ Verm. Schrift., iv., 298, 299.

the existence of vested rights, and the other rejects every amelioration demanded by the times.\*

The System of Modern Roman Law—the great work for which the dogmatic monograph of his earlier years, and the vast historical and exegetical labours of his middle life, were but an appropriate preparation—was begun in order to give him the consolation of labour after the death of his only daughter, who, married to Constantin Schinas, a Greek statesman, died at Athens, in 1835. This work is not easily to be overrated. If it had been finished, it would have embraced the whole scientific jurisprudence of the nineteenth century. As it stands, it not only shows the way in which Germans must proceed in order to precipitate what is obsolete and what has been foisted in, from what is genuine and subsisting—what is foreign, from what is purely national in their law; but it also presents to foreigners a grand pattern of what a system of jurisprudence ought to be. The first five volumes appeared in quick succession in 1840 and 1841, but more burdensome and more important labours than he had yet sustained delayed the execution of the rest. The Minister von Stein had long since indicated Savigny as the future “Grosskanzler” of Prussia. His merits and his works confirmed the foresight of that great statesman, and in March, 1842, he took leave of his students, and of the career in which he had employed his energies and influence for forty years.

Savigny's office placed him at the head of the new ministerial department for revising the laws. In this position he strove, not for a new codification, but for the excision of what was antiquated or falling into disuse. In the provincial laws, he sought rather for scientific elaboration than codification. The most important result of this period of legislation were the laws on bills, which led to the first general statute of the German States in modern times.† Not less enlightened reforms were effected in the removal of arbitrary and capricious grounds of divorce, and in the absence, in his project for a

\* See System, § 400.

† See System, vol. viii., p. 150.

criminal code, presented in 1845, of all punishments, such as flogging, confiscations, &c., which lose sight of the moral aims of penal law. A vain attempt was made to introduce oral pleadings of parties before the judge, a reform desired by Frederick the Great; but it could not be adapted to the existing law of procedure. A pamphlet by Savigny advocated a better system in divorce causes, which was adopted in 1844.\* In 1848, he ceased to hold an office, which was then shorn of many of its prerogatives by the increased share of the public in legislation. Although never so obnoxious to the Liberals of Germany as his colleague, Eichhorn, the Minister of Public Instruction, it would perhaps have been better for Savigny's fame that he had not for seven years been one of a retrograde ministry—the creatures (Humboldt calls them sycophants) of an absolutist king. The jurists of the historical school who have become statesmen, have too often been justly liable to the charge of ceasing in politics to regard the past as merely explaining the present, and of having come to venerate in the present every institution that had any traditions or root in the past.

Savigny could now proceed with his proper work, having leisure to continue his *System*, of which only one volume (the sixth, in 1847) had appeared during his tenure of office. In October, 1850, the congratulations of the universities, academies, heads of law courts, and administrative departments, gave to the fiftieth anniversary of his doctorate the lustre of a national festival. He himself prepared, as a thank-offering and memorial, a collection of all the detached papers he had written during the half-century.† He looked back with peculiar pleasure on his share in those resuscitations of ancient law sources which signalized that period. In one form

\* As early as 1816 he had disapproved of the scandalous laxity of the Prussian law of divorce. (*Zeitschrift*, iii., 25).

† Professor Rudorff notices the accidental omission in the "*Vermischte Schriften*," of the review of Glück's "*Intestaterbfolge*," which appeared in 1804, in the *Jenaische Literaturzeitung*, and which Savigny acknowledged as his when a question arose whether it was written by him or Heise.



or another, he had shared in them all. He was the first to restore Ulpian to his original rank. In the Academy, and through his friends and pupils, Göschen and Bethmann-Hollweg, he first recognised the value and significance of Niebuhr's discovery of Gaius in 1816. It was he who, through the Academy of Sciences, opened a new source of knowledge of Roman law, in the systematic collection and critical examination of Latin inscriptions all over Germany—an undertaking attempted at great expense, but soon renounced under the ministry of M. de Villemain, in France.\* This labour the enthusiastic biographer hopes will result in not less glory to Germany, and not less advancement to ancient learning, than the older sister study, "epigraphik," has done for the Greek language.

With this retrospect he intended to end his literary work. He was, however, prevailed on to finish, in 1851 and 1853, two volumes, containing the general portion of the "Obligationenrecht," which he deemed the most necessary of the special subjects embraced in his System. He did this at the pressing request of an old friend and pupil of the Landshut era, the Baron von Salvotti, distinguished for his share in the reform of legal education in the Austrian universities. He repeatedly refused the entreaty to expound the true doctrines of *Culpa* and *Interest*. He finished his literary activity exactly fifty years after the appearance of the "Recht des Besitzes." He declined to labour any longer with failing vigour on the fields where he had won his fame in the freshness of youth and the ripe strength of manhood. Nor could the seat in the "Herrenhaus" and the "Kronsyndicat," which dignities, with the order of the Black Eagle,† the late king conferred upon him, induce him to resume his part in the work of legislation.

\* Acten der K. Acad. der Wissenschaften Abschn., ii., vi., d. No. 17. Blatt 41, 26 Jan. 1846.

† On the death of Alexander von Humboldt, the present king, then prince regent, bestowed on him the office of Chancellor of the "Friedens-classe" of the Order of Merit.



The record of his declining years contains little but the enumeration of the honours he received from an admiring king and people. Besides those already mentioned, two must not be omitted. At the jubilee of the university which he had tended from its cradle, the rector mentioned him as one still living of the illustrious founders of the institution.

“Only a few days later (31 Oct., 1861), on the second and more singular jubilee of Savigny’s doctorate, the sixtieth anniversary, there assembled in the family circle of the elder of his two surviving sons, now Prussian ambassador at Dresden, the delegates of the universities and academies, of the highest tribunals, and even of the royal houses of Germany, around the prince of German jurisprudence. He appeared among the friendly throng with firm bearing, even at such an age a form of manly dignity, with the expression of inward emotion and of calm satisfaction at the quiet but heartfelt sympathy; and he who saw the noble brow, the mild yet spirited eye, the clear profile, forgot that eighty-one years had passed over that thoughtful brow, that still unwhitened hair, and that unbent figure. In a few plain, simply natural, yet affectionate words, he spoke his thanks. I have preserved them as noted down, and impart them as a memorial of that hour. ‘In old age,’ he said, ‘the faculties decay one after another. One remains to me, for which I am thankful. It is love for the many who, in my long professional life, have accompanied me as pupils and friends, some also as comrades in my calling. These I see nobly represented around me, and among them my beloved sons. I thank them for all the love they have shown to me, as well as for the great happiness of this day. I ask them to keep their love for me in the short remaining period of my life.’

“This love,” continues his affectionate pupil, “in which the first earnest solemnity of his character had entirely merged, together with the deep inward piety of his heart, bore for him during this brief period the heaviest burden of old age, the clear and quietly expressed consciousness of being compelled to survive, and having survived not only others, but himself.”

He died peacefully and hopefully, in October, 1861, survived by his wife, who had been the companion of his long

life and the nurse of his old age; by two of his six children, and by a troop of grandchildren.

In April, 1848, he had given his noble collection of extremely valuable MSS. and printed books to the Royal Library, under reservation of his property. A codicil of 26th May 1852, left it as a bequest to that library under certain conditions. The collection, which is not to be separated, includes forty-four MSS., among others the famous MS. of the West Gothic Laws, unprinted collections of Canons, Burmann's collations of Martial, the letters to Graevius, Leibnitz's Correspondence with Schulenberg, from 1704 to 1713; 178 volumes of the Glossators; 284 editions of Roman law sources, conspicuous among which is the rare Schöffers *Princeps Editio* of the Institutes.

It is left to the determination of Professor Rudorff whether any of his *Adversaria*, or of the notes used for his lectures, should be published. We are led to conclude that it is not probable that any great advantage would accrue to learning from the publication of materials which have already been communicated to the world in another form by Savigny and his pupils, especially as they must now lack the finishing touches of the master's hand. His own desire is not declared; but it is safe to conclude that no wish for personal distinction influenced him in allowing this option. The preface to his *System* nobly expresses the views of a great mind, conscious of the defects of its works, yet not withholding them if they contribute but a mite to the advancement of science.

"Now when a considerable portion lies before me completed, I might wish that much of it had been more exhaustive, plainer, and therefore different. Should such a knowledge paralyze the courage which every extensive enterprise requires? Even along with such a self-consciousness, we may rest satisfied with the reflection that the truth is furthered, not merely as we ourselves know it and utter it, but also by our pointing out and paving the way to it, by our settling the questions and problems on the solution of which all success depends; for we help others to reach the goal which we are

not permitted to attain. Thus, I am now satisfied with the consciousness that this work may contain fruitful seeds of truth, which shall perhaps find in others their full development, and bear rich fruit. If, then, in the presence of this full and rich fructification, the present work, which contained its germ, falls into the background, nay, is forgotten, it matters little. The individual work is as transient as the individual man in his visible form; but imperishable is the thought that ever waxes through the life of individuals—the thought that unites all of us who labour with zeal and love into a greater and enduring community, and in which even the meanest contribution of the individual finds its permanent place.”—(System, vol. i., Vorr. p. l., and comp. vol. viii., Vorr. p. vi.)

Such a passage expresses that conquest of self which his biographer regards as the grand feature of his character, which is singularly prophesied in his family motto, “NON MIHI SED ALIIS,” and which is strenuously taught in his works. It implies not only a command over the passions and desires of the individual, but a victory over all isolation in politics, religion, or science, every particularism or sectarianism that separates a class or a race from the nation, that divides “the sect, the profession, or the age from the higher political, moral, historical, and scientific whole, of which it is a subordinate part.”

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## ART. VII.—CASE OF THE ALABAMA.

1. *Correspondence respecting the Alabama. Presented to both Houses of Parliament, by command of her Majesty. 1863.*
2. *Speech of the Solicitor-General on the case of the Alabama, in the House of Commons, 27th March, 1863. "Times," 28th March, 1863.*
3. *Copy of, or extracts from, the correspondence between the Commissioner of Customs and the Custom-house authorities, at Liverpool, relating to the building, fitting out, and sailing of the vessel, No. 290, since known as the Confederate cruiser Alabama. Ordered by the House of Commons to be printed, 24th March, 1863.*

THE case of the Alabama is sufficiently remarkable, both in its facts and in the arguments to which it has given occasion, to call for a thorough review of both. It may be asserted that, of all recent cases, this is the most likely to take its place as a leading one in the law of nations.

On June 23, 1862, Mr. Adams, the ambassador of the United States in London, addressed to Earl Russell, her Majesty's Secretary of State for Foreign Affairs, a letter in which, after mentioning "the equipment from the port of Liverpool of the gunboat, the Oreto, with intent to make war upon the United States," he says, "I am now under the painful necessity of apprising your lordship that a new and still more powerful war steamer is nearly ready for departure from the port of Liverpool on the same errand. This vessel has been built and launched from the dockyard of persons one of whom is now sitting as a member of the House of Commons, and is fitting out for the especial and manifest purpose of carrying on hostilities by sea. . . . I now ask permission to solicit such action as may tend either to stop the projected expedition, or to establish the fact that its purpose is not inimical to the people of the United States." We omit the details which Mr. Adams communicated on this

occasion in support of his statement, since they were not so authenticated that Lord Russell could take upon them any other action than that which he adopted without loss of time, in referring the matter to the Commissioners of Customs for inquiry. But we direct attention to the statement itself, because it expresses clearly the ground taken up by Mr. Adams, and to which he firmly adhered throughout. This is the more necessary on account of the subsequent introduction into the argument, by other parties to it, of the very different topic of passive contraband.

The name of passive contraband, not much known in England, and implying a doctrine little countenanced by English statesmen, has been given to the sale by neutrals, on their own soil, to the agents of a belligerent, of those articles which, if the neutrals transported them by sea to the belligerent, would be articles of contraband properly so called. The name of course implies that the traffic so designated is held to be a breach of the duties of neutrality; but, since it takes place on a neutral soil, a belligerent who should deem himself aggrieved by it would have no means of executing justice on the neutral with his own hand. If the goods are shipped, and he takes them at sea, the neutral suffers no loss, because, from the nature of the case, the goods have already become the property of the enemy. War, then, against the neutral is the only possible remedy of the aggrieved belligerent; and much learning and philosophy have been expended on the question whether a war undertaken for such a cause would be just. Upon that question we shall not spend much time, knowing that for such a cause no recorded war has been undertaken, and believing it to be in the highest degree improbable that any ever should be. If we imagine a neutral country to be so great a mart for arms and munitions of war that either belligerent is essentially aided by purchasing them there, the chance is enormous that the other belligerent will also have resorted to the same source of supply; and although it is not true that a breach of

neutrality is excused by offering similar advantages to both sides impartially, yet it is not very probable that the balance of advantage derived by either will, in the case we have supposed, be so great an inconvenience to the other that, by declaring war against the neutral, he will multiply his enemies in order to get rid of it. Far be it from us to license the indulgence of all unfriendly dispositions which in any particular instance may not be likely to draw down actual vengeance on the misdemeanants. But to assert international duties, the positive enforcement of which is utterly and in every case improbable, is a folly like that of enacting national laws with no sanction of any kind. As such enactments, being surely disobeyed, could only tend to bring all law into contempt, so the denunciation of passive contraband by theorists tends to make neutrals reckless of the duties really incumbent on them. It does even worse than this, for it encourages belligerents to cherish a grudge at being wronged by a traffic which in fact is inevitable, since scarcely even the most despotically governed country could endure so systematic an interference by the authorities with the dealings between individuals within its territory, as would be necessary in order to prohibit it with effect. These considerations must outweigh the importance of rounding off a theory about contraband, of which, since there is no commerce that does not, directly or indirectly, augment the resources of a nation for war, it will never, after all, be possible to give a consistent account, while any intercourse between neutrals and belligerents is permitted.

Mr. Adams, then, took up no ground so weak as that which we have been exposing: his representation was based on the duty of a neutral not to permit the use of his territory as a startingpoint, or base of operations, for a hostile expedition. This duty is clear: to furnish our government with the means of performing it was the main object with which the Foreign Enlistment Act was passed in 1819. But there is a point in its application at which it becomes a matter of

some nicety to distinguish the cases which fall under it from those which belong to the chimerical field of passive contraband. Suppose, for instance, that a single vessel sails from our ports, built and adapted for war alone, and in the actual service of a belligerent government, but wholly unarmed and unprovided with the munitions of war, and having no one on board who was enlisted within our territory into the service of her government: does this vessel constitute in herself a hostile expedition—equally inapt as she is for war and commerce, though, even in her unfurnished state, not absolutely incapable of either? Is there anything more in her case than the sale to a belligerent of a hostile weapon, for such is eminently a ship built for the purposes of war, but a sale effected in a neutral port, and therefore exposing the neutral to no blame, though the purchaser carry off his acquisition and use it to the serious detriment of his adversary? We should have no difficulty in accepting the former alternative, considering the public service and hostile errand on which the vessel quits our shores. And we should claim a strong support for that opinion in the seventh section of the Foreign Enlistment Act, which makes it a misdemeanour to “*fit out or arm*” a vessel, for employment in foreign service, “*as a transport or storeship, or with intent to cruise or commit hostilities,*” against friendly powers; and proceeds to declare the forfeiture of such vessel, and to empower the officers of customs and excise to seize her. Hence it clearly appears that the gist of the offence against the act lies in the public service against alien friends, independently of any armament, and even in spite of proof that the service intended, though hostile, is not that of an armed ship of war. Nor could it be objected that the Foreign Enlistment Act does not declare the law of nations; for its preamble recites that the offences against which it is directed “*may be prejudicial to, and tend to endanger, the peace and welfare of this kingdom,*” which can only be by their giving just ground of complaint to foreign powers.”

But the case we have supposed falls short of that of the Alabama, by wanting the material ingredient of there being men on board enlisted within our territory for the service of the belligerent government; yet we are sorry to say that the argument of the Alabama's case, in the British press and in parliament, has been marked by a laborious attempt to assimilate it to the cases of so-called passive contraband.

The next date of importance in the narrative is July 21, when the United States' consul at Liverpool presented six affidavits to the collector of customs at that port, "requesting me," says the collector, "to seize the gunboat" to which Mr. Adams had referred in his letter of June 23, then known as No. 290, but since as the Alabama. Copies of the same affidavits were received by Lord Russell from Mr. Adams on the following day (July 22), with a report of the consul's application to the collector "to act under the powers conferred by the Enlistment Act." Of this circumstance, and those which followed, the Solicitor-General gave the following account to the House of Commons:—

"It was on the 22nd that he (Mr. Adams) transmitted his first series of depositions; *he did not complete his evidence till the 24th, and the letter in which he sent them was not received till the 26th, so that he did not place the evidence on which he relied in the hands of the government till the 26th of July.* In the meantime he obtained the opinion of the honourable and learned member for Plymouth, who, on the 16th, stated his belief that there was a case of suspicion, but not enough to justify the detention of the vessel. When the evidence was completed, it was laid before the honourable and learned gentleman, who, on the 23rd, thought there was a case sufficient to warrant her detention. Upon that evidence the legal advisers of the government came to the same conclusion as the honourable and learned member. But I wish the House to understand that in those depositions there was a great mass of hearsay evidence, which, taken by itself, could not form the basis of any action. Of the six depositions transmitted on the 22nd of July, only one was good for anything at all, namely the evidence



of a person named Passmore, which was sufficient to prove material facts. Two more were sent, corroborating Passmore, on the 24th, and were received by Earl Russell *on the 26th, Mr. Adams having taken all that time to get his evidence ready.* Now what is the delay of which we are accused? The 26th was Saturday, and the 27th Sunday. *The complete evidence was not in the hands of Earl Russell till the 26th,* and he told Mr. Adams on the 28th, that is on the Monday, that the law officers of the Crown were consulted. He got their opinion on the 29th, and that very same day a telegraphic message was sent down to stop the ship. Really, sir, one is shocked at the perversion of mind which arises under, I admit, the most excusable circumstances; for the House will give me credit for sincerity when I say that no one makes more allowance than I do for the natural feeling of irritation on the part of the American nation. No one can be more anxious than I am that we should stand straight with them, and they with us; but I must say that, but for the perversion of mind consequent on an irritable state of feeling, traceable to causes with which we can sympathise, I cannot conceive how any human being can say that the government have not acted with the promptitude which they ought to have shown."

Three or four times in the above passage, and in as many different ways, does the Solicitor-General impress on the House and the world that Mr. Adams did not, till the 26th, complete his evidence, or get it ready, or place in the hands of the government the evidence on which he relied. We therefore believe that it is our readers who will have their turn of being shocked at the perversion of mind which arises under more or less excusable circumstances, when we tell them that the evidence transmitted by Mr. Adams to Earl Russell on the 22nd was a complete body of evidence; that he relied on it; that he requested her Majesty's government to act on it; that he gave them no hint of any further evidence to come; and that if the government ever received any further evidence from Mr. Adams, it was not because he thought it necessary to his case, but because time had

been given for its transmission by the refusal of the government to act upon the evidence on which they were formally and diplomatically required to act. That our readers may judge for themselves, we will place before them the full text of Mr. Adams's letter of the 22nd to Earl Russell:—

*“Legation of United States, London, July 22, 1862.*

“MY LORD,

“I have the honour to transmit copies of six depositions taken at Liverpool, tending to establish the character and destination of the vessel to which I called your lordship's attention in my note of the 23rd of June last.

“The originals of these papers have already been submitted to the collector of the customs at that port, in accordance with the suggestions made in your lordship's note to me of the 4th of July, as the basis of an application to him to act under the powers conferred by the Enlistment Act. But I feel it to be my duty further to communicate the facts, as there alleged, to her Majesty's government, and to request that such further proceedings may be had as may carry into full effect the determination which I doubt not it ever entertains to prevent, by all lawful means, the fitting out of hostile expeditions against the government of a country with which it is at peace. “I avail, &c.,

“CHARLES FRANCIS ADAMS.”

There cannot be a more hopeless contradiction than that which exists between the above letter and the statement that Mr. Adams did not, till the 26th, place in Earl Russell's hands the evidence on which he relied. But in Mr. Adams's letter of the 24th, enclosing the two additional depositions, and Mr. Collier's opinion on the case presented by all the eight affidavits, there does occur an expression which seems to sanction another of the phrases used by the Solicitor-General.

The letter is as follows:—

*“Legation of the United States, London, July 24, 1862.*

“MY LORD,

“In order that I may complete the evidence in the case of the

vessel now fitting out at Liverpool, I have the honour to submit to your lordship's consideration the copies of two more depositions taken respecting that subject.

"In the view which I have taken of this extraordinary proceeding as a violation of the Enlistment Act, I am happy to find myself sustained by the opinion of an eminent lawyer of Great Britain, a copy of which I do myself the honour likewise to submit.

"Renewing, &c.,

"CHARLES FRANCIS ADAMS."

What need was there that evidence should be "completed" on which Mr. Adams already relied? Clearly the completion was necessary to satisfy some other persons, who did not rely on the evidence as it stood before. Who these persons were is shown by the following letter from the Commissioners of Customs to the collector of customs at Liverpool, printed in the second parliamentary paper named at the head of this article, which was not in the hands of members till after the delivery of the Solicitor-General's speech:—

"*London, July 22, 1862.*

"SIR,

"Having considered your report of the 21st inst., No. 1,200, stating, with reference to previous correspondence which has taken place on the subject of a gunboat which is being fitted out by Messrs. Laird, of Birkenhead, that the United States' consul, accompanied by his solicitor, has attended at the customhouse with certain witnesses, whose affidavits you have taken and transmitted for our consideration, and has requested that the vessel may be seized under the provisions of the Foreign Enlistment Act, upon the ground that the evidence adduced affords proof that she is being fitted out for the government of the Confederate States of America:

"We acquaint you that we have communicated with our solicitor on the subject, who has advised us that the evidence submitted is not sufficient to justify any steps being taken against the vessel under either the 6th or 7th sec. of Act 59 Geo. III., cap. 69; and you are to govern yourself accordingly.

"The solicitor has, however, stated that if there should be sufficient evidence to satisfy a court of enlistment of individuals, they would

be liable to pecuniary penalties, for security of which, if recovered, this department might detain the ship until those penalties are satisfied, or good bail given ; but there is not sufficient evidence to require the Customs to prosecute ; it is, however, competent for the United States' consul, or any other person, to do so, at their own risk, if they see fit.

“ T. F. FREMANTLE.

G. C. L. BERKELEY.”

It is true that, in the published documents, there is no other trace that the opinion of the solicitor of the Customs was communicated to Mr. Adams, than that which is furnished by the pregnant phrase, “ in order that I may complete the evidence,” in his letter of the 24th. But, besides that phrase, it is not conceivable that Mr. Adams's letter of the 22nd should have remained altogether without acknowledgment until the 28th, as on the face of the papers it would seem to have done ; and whether or not Mr. Adams received a verbal communication of the opinion, he would at any rate hear it from the United States' consul at Liverpool, to whom its effect, in the refusal to stop the ship, must have been immediately known. Hence, no doubt, it was that he took the opinion of Mr. Collier on the 23rd, and applied the final stimulus to the government by the transmission of that opinion enclosed in his letter of the following day. But, if this be so, Mr. Adams's expression, “ in order that I may complete the evidence,” which, as repeated by the Solicitor-General, must have aided in impressing on the House that he took all the time till the 26th to get ready that “ evidence *on which he relied*,” really conveyed to those who knew the facts the opposite meaning of an attempt to satisfy some who, in Mr. Adams's distinctly expressed judgment, ought to have been satisfied before. However this may be, two things stand out clearly : first, that Mr. Adams did, by the 22nd—even by the 21st, if we take the date of its communication to the collector at Liverpool, who had power to act—“ get ready ” that “ evidence *on which he relied* ;” secondly, that, since a

government opinion was actually given on the 22nd, the only excuse which it remains possible to suggest for not stopping the *Alabama* is that the opinion given on that day was the right one on the evidence as it then stood. To the question whether this was so, we shall now address ourselves.

Now, that question is sufficiently answered by pointing out that the additional affidavits contain no facts of a different description from those deposed to in the former ones. They are the affidavits of a ship-carpenter and a mariner, who had been enlisted for the gunboat by Captain Butcher, her commander, in each case with full notice of her being built for the Confederate government; and, in the case of the mariner, who had told the captain "that he wanted to get South in order to have retaliation of the Northerners for robbing him of his clothes," with an express intimation in reply, "that if he went with him in his vessel he would very shortly have that opportunity." But the seaman Passmore, one of the former deponents, had given still more direct evidence to the same effect.

"Captain Butcher asked me if I knew where the vessel was going; in reply to which I told him I did not rightly understand about it. He then told me the vessel was going out to the government of the Confederate States of America. I asked him if there would be any fighting; to which he replied, 'Yes, they were going to fight for the Southern government.' . . . The said Captain Butcher then engaged me as an able seaman on board the said vessel, at the wages of £4 10s. per month; and it was arranged that I should join the ship in Messrs. Laird and Co.'s yard on the following Monday. To enable me to get on board, Captain Butcher gave me as a password the number 290. . . . There are now about thirty hands on board her, who have been engaged to go out in her. Most of them are men who have previously served on board fighting ships."

Well might the Solicitor-General confess that Passmore's evidence "was sufficient to prove material facts," and that the subsequent depositions merely "corroborated" him. Material, indeed! Why, besides the power which we have already

quoted to seize a ship fitted out for a hostile service against alien friends, the fifth section of the Foreign Enlistment Act, to which the solicitor of the Customs did not refer, gives power to detain any vessel having on board persons enlisted or engaged within the kingdom for foreign military or naval service. Well, too, might so great an advocate feel that when the affidavits and the dates of their receipts were already in the hands of members, a case could only be made out for the government by labouring to show that Mr. Adams had not, on the 22nd, put them under the necessity of saying aye or no, whether they would act on Passmore's evidence. That the law officers should be consulted on the Monday, and that a telegram should be sent on the Tuesday to stop the ship, speaks well for their promptitude, though not better than all who know the Solicitor-General would expect. It is even possible that the defence might have been more candid, had any personal blame been in question. But, however that may be, when the vice of advocacy intrudes itself into questions of state, and especially when the finishing touch of its rhetoric is one of disdainful pity for a great and sensitive nation, with which, in this matter at least, no fault is to be found, it becomes a duty to expose it.

But the Alabama sailed on the eighth morning after the request to detain her was made to the collector at Liverpool, the morning of the day on which a tardy effort was made to prevent the expedition. Now the right of a foreign state, to claim satisfaction for the hostile use of territory professedly friendly, depends in no way on the means of preventing such use which the government of that territory may possess. If the French had seized Antwerp, and were preparing an expedition from it against our shores, we should not refrain from hostilities in the Scheldt, because the kings of the Belgians and the Netherlands might demonstrate their perfect innocence of all complicity. If Canada were invaded by a party coming from the state of New York, our ambassador at Washington would treat with contempt any disquisition on the respective consti-

tutional powers of the federal and state governments. The answer would be: "Of your constitution we know nothing but this, that it points out the authorities at Washington as the only ones to whom we are allowed diplomatic access; to us, therefore, those authorities are answerable for all that takes place within the territories which, towards us, they claim to represent." And as little as foreign states are concerned with the relations between a federal government and the members of the federation, so little are they concerned with the relations between a government and its individual subjects. Whether the central power be strong or weak, whether the bond of union between the elements of a nation be firm or loose, are questions for itself alone. The united responsibility of the nation to foreigners, for the amicable employment of its territory, is among the first principles of international law. We do not trouble ourselves with thorny questions of Brazilian law, when our citizens, not voluntarily landing in Brazil, but thrown on her coast by the common perils of the sea, receive there a treatment reprobated by the common voice of humanity. If our statute book should contain any provisions going beyond the received law of nations, as if an act should be passed to prohibit any traffic within British territory which is affected by no international doctrine but the chimera of passive contraband, an ambassador who should request our government to enforce it would be bound to accept it such as it might be. But, putting the case of the *Alabama* on the ground which he most properly took up from the first, Mr. Adams was in no way concerned with any limitations or imperfections of the Foreign Enlistment Act. He might even ignore the question as to what Lord Russell calls "the legal authority of the law officers."\* We, indeed, have made up our minds on that question, and consider that, with the evidence we have quoted in his hands, a Foreign Secretary might, on July 22, 1862, have ventured to decide for himself that a hostile expedition was on the point of departure

\* Letter to Mr. Adams, of January 24, 1863.

from our shores, and that the Foreign Enlistment Act applied to the case. Nay, we will venture to assert that the law officers are not more the constitutional advisers of the Crown in the law of the land, than its responsible ministers are in the law of nations; and that however proper a reference to the former may be on the effect of the Foreign Enlistment Act in a difficult point, or on prize law as actually administered in our Admiralty Court, yet a Chatham or a Canning would have held it his business to instruct the law officers, in case of need, in the duties of neutrality. But we must repeat that our duties to the United States in this matter are quite independent of our statute law and constitutional usage.

Such was the opinion of Mr. Canning, in the debates on the Foreign Enlistment Bill in 1819, and on the motion for the repeal of that law in 1823. He never put it as a boon to Spain; the law was wrung from him by a sense of duty, that the nation might fulfil obligations independently incumbent on her, while his keen sympathy was with the cause of the American colonies, to whose case it was first to apply. We have already seen how carefully the preamble appealed to the same argument, to justify a measure which would otherwise have been too alien to the principles of liberty to receive a moment's consideration from any government we have had since the revolution; and Mr. Canning's own words were these:—

“ I do not now pretend to argue in favour of a system of neutrality; but it being declared that we intend to remain neutral, I call upon the House to abide by that declaration, so long as it shall remain unaltered. No matter what ulterior course we may be inclined to adopt; no matter whether, at some ulterior period, the honour and the interests of this country may force us into a war; still, while we declare ourselves neutral, let us avoid passing the strict line of demarcation. When war comes, if come it must, let us enter into it with all the spirit and energy which become us as a great and independent nation. That period, however, I do not wish to anticipate, much less desire to hasten. If a war must come, let



it come in the shape of satisfaction to be demanded for injuries, of rights to be asserted, of interests to be protected, of treaties to be fulfilled. But, in God's name, let it not come in the paltry, petty-fogging way of fitting out ships in our harbours to cruise for gain.

"At all events, let the country disdain to be sneaked into a war. Let us abide strictly by our neutrality as long as we mean to adhere to it, and, by so doing, we shall, in the event of any necessity of abandoning that system, be the better able to enter with effect upon any other course which the policy of this country may require."\*

This was the language of an English statesman, when the struggles were scarcely closed which had made international topics as popular in England as those of free trade have since become. The spirit in which the legislation of that day will now be enforced is a test of the temper which a long peace, at least with all our ancient and most dreaded foes, has engendered. We are bound to say that there is at present no cause to be dissatisfied with that spirit, seeing the activity which, during the last few weeks, has been shown in detaining gun-boats reasonably suspected of being built in contravention of the law. That a most unfortunate slip was made in the case of the *Alabama*, is widely admitted by well informed persons whose speech is not moulded to official accents. But if men in official positions will persevere in falsifying public doctrines in order to cover the consequences of that slip, they must not be allowed to do so without a protest, more especially in these days, in which the study of state papers and parliamentary discussions, as containing the elements of international law, has been so largely developed.

The old furniture of that science consisted mainly in compilations of treaties and the opinions of those who are called jurists, whence the curious result followed, that a writer, while a theorist to his contemporaries, became, almost by the mere fact that he had written, an authority to his successors. This procedure was justified by the plea of collecting testimonies to the consent of mankind, who, or at least the thinking

\* Canning's Speeches, vol. v., pp. 51—2; 8 Hansard, N.S., 1057.

portion of them, were supposed to be governed on the whole by reason. But the criticism of the nineteenth century has detected philosophical partisanship and national prejudice even among the most respected of the elder jurists, and its prolific authorship has farther diminished the authority of writers by increasing the numbers who claim to share it; and since, in truth, it is rather the consent of nations, than of men as individuals, which must decide, there is a still deeper reason why the utterances of private writers, no matter what their wisdom or their fame, cannot be reckoned with those of the statesmen who are specially deputed to manage this portion of the affairs of their respective countries. Especially since the close of the last general war, the cheapness of printing, and modern habits of publicity, have furnished large material for the kind of research which thus begins to distinguish international jurisprudence. Numerous cases which are made the subject of diplomatic correspondence or of debates in public assemblies, but which neither give rise to treaties, nor would have become known in any authentic fashion to the writers of a century ago, are now recorded in the accumulating mass of published state papers. They illustrate international law in its daily working, as the laws of the land are illustrated by the experience of life, and supply that familiar knowledge of the matter with which its rules are concerned, without which he who should address himself to its more difficult questions would resemble a hermit brought from his desert into a strange city, to plead with booklearning a cause that turned on the manners of the place.

Nor need modern statesmen, as a class, fear the results of this publicity. They are not more warped by national interests and antipathies than the private writers of previous ages, who, moreover, were often put forward by their governments as unavowed and irresponsible champions. But as statesmen must now write and speak under a sense that they are furnishing quotations to generations of publicists yet unborn, so those who devote themselves to that line of research

must be impartial, and as little connive at error as they would aid in propagating it. Their rule must be that of Dante:—

“Ma per trattar del ben ch’ivi trovai,  
Dirò dell’altre cose ch’io v’ho scorte.”

We therefore point out for animadversion the attempt of Earl Russell to treat the case of the Alabama as analogous to “the accidental evasion of a municipal law of the United States by a particular ship;”<sup>\*</sup> and the double error of the Solicitor-General, in saying that “the Foreign Enlistment Act was passed for the defence of our neutrality against any invasion of it by other powers, and not in consequence of any obligation imposed on us;” and in representing the case of the Alabama as one simply of the sale of an instrument of war. The latter assumption runs through his whole speech, and comes to the surface in passages too numerous to cite, but of which the following may be taken as a sample:—“In the present instance, the sale of a vessel of war is an offence purely because our own law has declared it to be so.” In fact, he altogether ignores the question of the hostile use of neutral territory, as the starting point of expeditions, and the base of their operations. So complete a preterition of a point often and clearly put by Mr. Adams, by an advocate whose intelligence never misses the force of an argument, and whose subtlety we never before knew at fault for an answer, is the highest testimony which we could have imagined to the strength of his adversary’s case.

“It is clear,” said Mr. Adams, in his letter to Earl Russell of November 20, 1862, “that the reciprocation of such practices could only lead in the end to the utter subversion of all security to private property upon the ocean. In the case of countries geographically approximated to one another, the preservation of peace between them for any length of time would be rendered by it almost impossible. *It would be, in short, permitting any or all*

<sup>\*</sup> Letter to Mr. Adams, of December 19, 1862, in Correspondence respecting the Alabama, p. 26.

*irresponsible parties to prepare and fit out, in any country, just what armed enterprises against the property of their neighbours they might think fit to devise, without the possibility of recovering a control over their acts the moment after they might succeed in escaping from the particular local jurisdiction into the high seas."*

And again, in his letter to the same minister of December 30, 1862 :—

"The only allegation which I find in your lordship's note in connexion with the United States is this, that vast supplies of arms and warlike stores have been purchased in this country, and have been shipped from British ports to New York for the use of the United States' government. Admitting this statement to be true to its full extent, conceding even the propriety of the application of the term 'vast' to any purchases that have been made for the United States, the whole of it amounts to this, and no more, that arms and warlike stores have been purchased of British subjects by the agents of the government of the United States. It nowhere appears that the action of the British went further than simply to sell their goods for cash. *There has been no attempt whatever to embark in a single undertaking for the assistance of the United States in the war they are carrying on ;* no ships of any kind have been constructed or equipped by her Majesty's subjects for the purpose of sustaining their cause, either by lawful or unlawful means, nor a shilling of money, so far as I know, expended with the intent to turn the scale in their favour. Whatever transactions may have taken place have been carried on in the ordinary mode of bargain and sale, without regard to any other consideration than the mere profits of trade. . . . My present object in referring so much at large to these offences is to show the great injustice of your lordship in proceeding to comment upon the action of the respective belligerents as if there was a semblance of similarity between them. So far as the United States are shown to be involved in censure, it is simply by the purchase and export of arms and munitions of war from a neutral—an act which your lordship expressly points out eminent authority to my attention to prove implies no censurable act on either party ; whilst, on the other hand, it is American insurgents who find

British allies to build, in this kingdom, and to equip and send forth war-ships to depredate on the commerce of a friendly nation. . . . Surely this is a difference not unworthy of your lordship's deliberate observation."

This was no novel line of argument, and Earl Russell admitted its force. In his letter to Mr. Adams of January 24, 1863, after repeating the attempt to prove that the government had acted with sufficient promptitude, his lordship proceeds thus:—

"As to other points we are nearly agreed, so far as the law of nations is concerned. But with respect to the statement in your letter that large supplies of various kinds have been sent from this country by private speculators for the use of the Confederates, I have to observe that that statement is only a repetition, in detail, of a part of the assertion made in my previous letter of the 19th ultimo, that both parties in the civil war have, to the extent of their wants and means, induced British subjects to violate the Queen's proclamation of the 13th of May, 1861, which forbids her subjects from affording such supplies to either party. It is no doubt true that a neutral may furnish, as a matter of trade, supplies of arms and warlike stores impartially to both belligerents in a war, and it was not on the ground that such acts were at variance with the law of nations that the remark was made in the former note. But the Queen having issued a proclamation forbidding her subjects to afford such supplies to either party in the civil war, her Majesty's government are entitled to complain of both parties for having induced her Majesty's subjects to violate that proclamation; and their complaint applies most to the government of the United States, because it is by that government that by far the greatest amount of such supplies have been ordered and procured."

It is rather strong, because a belligerent does not close his ports against contraband, to refuse to him the common duties of neutrality. And we find it hard to follow Lord Russell's reasoning about the Queen's proclamation. We have always understood that the sovereign of this realm can make nothing illegal by proclamation. So far, then, as the supply of arms and warlike stores to belligerents is not at variance either

with the law of nations or with the statute law of England, a proclamation forbidding it must be a nullity; and it is not respectful to the sovereign to interpret in such a sense any proclamation which may have been issued. If, therefore, his lordship is not devoted to the theory of passive contraband—and the correspondence in this case sufficiently proves that he is not guilty of that heresy—we submit that he ought not to have expounded the Queen's proclamation as forbidding the sale of arms and warlike stores within the limits of her Majesty's dominions.\* It was a desperate effort to cover, by recrimination, an unlucky practical slip, and we are happy to think that it does not interfere with the value of his lordship's recognition of the difference between common purchases in the markets of the world and the hostile use of neutral territory. We therefore leave this case with the confident belief that, memorable as it will remain among the precedents of international law, the sophistry which has been expended on it will not weaken any principle of that important science.

\* The truth about the proclamation is simply this: it commands the Queen's subjects in general terms to observe a strict neutrality, and to abstain from violating either the law of the realm or that of nations; and it warns them of the consequences of certain specified acts, of which the carriage of contraband, but not its sale, is one. This is not what any one would understand from such an account of the proclamation as is given in Lord Russell's statement, that it "forbids the affording supplies." But let the expression pass. In substance, if his lordship refers to the *carriage* of contraband, the result is that, since no belligerent can really be expected to close his ports against that kind of commerce at the moment when he most needs it, any power may free itself from the obligations of neutrality by warning its subjects against the penal consequences of carrying contraband. And, if his lordship refers to the *sale*, then his statement that the proclamation forbids it must rest on the assumption that it is either a violation of neutrality, or of the law of England, or of the law of nations, every one of which things his lordship says repeatedly in this correspondence that it is not. We do not, therefore, positively insist on the suggestion in the text of a disrespectful interpretation of the Queen's proclamation. A theory at least equally plausible is that no intelligible interpretation at all is put on it in that memorable part of the correspondence which begins with the sentence—"With regard to the claim for compensation now put forward by the United States' government, it is, I regret to say, notorious that the Queen's proclamation of the 13th of May, 1861, enjoining neutrality in the unfortunate civil contest in North America, has in several instances been practically set at nought by parties in this country."—*Earl Russell's letter to Mr. Adams of December 19, 1862.*

## ART. VIII.—LORD MACKENZIE ON ROMAN LAW.

*Studies in Roman Law, with comparative Views of the Laws of France, England, and Scotland.* By Lord MACKENZIE, one of the Judges of the Court of Session in Scotland. William Blackwood and Sons, Edinburgh and London. 1862.

**I**N our last Number we gave a brief notice of this work, and we have since carefully read it. The perusal has fully borne out the impressions we have already indicated; and, without being unnecessarily encomiastic, we hail it as an excellent, and, in many respects, highly serviceable, production for the cause of jurisprudence. And it has come from a somewhat unexpected quarter. These are not the days when people look for anything from our judges beyond the faithful discharge of their important and practical duties; and any public evidence of the exercise by them of other intellectual energies would, in England, we fear, instead of attracting the interest of the people, in all probability beget a suspicion that the judicial office, which allows a studious leisure so unmistakably proved, may not be so laborious or responsible as it is claimed for its high rank and large salary truly to be. And not only so, it might be contended with much plausibility that there was an inappropriateness in a judge,—before whom, in an artificial and complicated society like ours, disputes might come, calling for the novel and unanticipated application of the rules of law,—committing himself (in the hopeless manner a *book* always does) to positive statements of legal opinion which the litigation of his Court may require him to reconsider, to the peril not merely of his scholarly reputation, but even of his judicial impartiality. It certainly would be very disagreeable for a judge to have his own book quoted against him, and it might

even be that his matter-of-fact publisher might not altogether like the result of the incident! Some of their lordships, no doubt, would get over the difficulty jauntily enough; and we have in our eye more than one learned personage whose *nonchalant* ingenuity would not, in the case supposed, readily fail him. On the other hand, the weight of such authorship is naturally greater than would be allowed to the exposition of ordinary and irresponsible members of the profession; and therefore, unless a judge writes not only well, that is, like a scholar and a gentleman, but also with precise accuracy, he may unconsciously involve the community, among whom he proposes his book to circulate, in a certain measure of embarrassment, and even of injury. There are curiously constituted idiosyncrasies who delight in litigation, and who are never happy except when they are in contention with their fellow men. And such disputants nothing can deter or discourage. But the great majority of people are peacefully inclined, and would accept the dictum of a book in preference to the opinion of its judicial author given after much argument and cost.

It is, in truth, not easy to discriminate as to the possible anomalies of judicial authorship, and perhaps it would be better for judges not to write books at all. But there is no reason why, when they do essay such labours, their works should not be fairly considered, and every reasonable testimony borne to their worth. Nor need we speculate on the possibility of a judge writing a bad book, and certainly with Lord Mackenzie's "Studies" and "Comparative Views" in our hands, we have no difficulty of the kind; and so far from being troubled, in his case, with the fancied embarrassments of such literature, we feel thankful that the duties of a puisne judge in the Court of Session can be so suitably and beneficially relieved. With a due allowance for the natural prevalence throughout its pages of Scotch legal idiom, the work must be regarded by the well-read English lawyer as one of great merit. Its literary



qualities, too, are not inconsiderable, although we believe it is the first attempt of the kind Lord Mackenzie has made.

At the Bar, Mr. Thomas Mackenzie was long known as a hard-working, largely employed, and successful lawyer; and when, towards the latter portion of his forensic experience, his professional industry became tempered with a certain quiet indulgence in party politics, he offended no one, while he commended himself to the notice of his adopted political leaders. His demonstrations, indeed, in this behalf must have been very welcome, for, with the exception of the late Lord-Advocate Rutherford, the Whig Bar of the period was not remarkable in Scotland for its learning or ability. It was not, then, to be wondered that, according to the course of promotion in fashion in that country, Mr. Mackenzie, after passing the bench of the County Court, as Sheriff of Ross and Cromarty, received his silk gown as Solicitor-General, and, with the appointment, his official claim to further elevation—a claim that was ere long recognised by his appointment to the puisne judgeship, which enables him to add the prefix “Lord” to the title-page of his book.

His lordship appears to have applied himself to his self-imposed task with all the calm knowledge and self-possession of the ripe legal scholar, and his measured language is characterised by a directness and simplicity admirably calculated for his purpose. In fact, it is but justice to say that the work throughout bears the most remarkable testimony to the literary refinement induced by the studious examination of legal science. In his preface he tells us that his main object was to exhibit the principles of the Roman law—a study which, he asserts, “has made great progress on the Continent of Europe, and especially in Germany and France;” but he truly observes that,

“In this country we have certainly not kept pace with our continental neighbours, but it is gratifying to observe that a strong desire has been recently manifested in professional circles to raise the standard of legal education by devoting more attention to Roman

law and general jurisprudence. This has led to the establishment of new chairs in some of our Universities, and of readerships by the Inns of Court in London, while it has called forth from English writers a considerable number of works on Roman law of various degrees of merit, but calculated in the whole to enrich our legal literature."

Of his own juridical mission as a writer, he thus speaks:—

"Without trenching on the ground already occupied by these authors, a good elementary book in English is still much wanted, giving a clear, simple, and accurate view of the general principles of the Roman law, with so much of its history as is necessary for a correct knowledge of the system.

"In the present work I have endeavoured to give a concise exposition of the leading doctrines of the Roman law, as it existed when it reached the highest development in the age of Justinian; and great pains have been taken to simplify the subject as much as possible, by a systematic arrangement, by avoiding all abstruse inquiries of an antiquarian character, and by confining myself to such matters as appeared to be useful and instructive.

"At the outset, I have introduced an historical sketch of the sources of the Roman law, and the political changes in the government, from the foundation of Rome to the accession of Justinian; of the legislative works of that Emperor, in the middle of the sixth century, when all the existing laws and imperial constitutions were revised and consolidated; of the fate of Justinian's legislation in the East and West; and, lastly, of the revival of the study of the Roman law in Europe in the twelfth century, and the progress of this department of knowledge from that epoch down to the present time."

The learned lord proceeds to observe:—

"To this exposition, which is my chief design, I have added a subordinate one, by drawing some comparisons, more or less important, between the Roman system and the laws of France, England, and Scotland; and, although these illustrations are imperfect and compressed within narrow limits, it is hoped they will prove more interesting to the general reader than if I had followed the example of many previous writers on Roman law, by entering into

minute technical details regarding ancient institutions and usages, which have little or no bearing on modern jurisprudence."

These quotations from the preface sufficiently explain the character and scope of the work, and were we to add that the design is, for the most part, well executed, we might say enough to induce the profession to give the book a place in their libraries, assuring them that they might with signal benefit and instruction frequently consult its well-considered statements. But it would not be fair to the learned lord or to our readers thus to stop short, and we shall therefore briefly note a few of the numerous points which attracted our attention.

Lord Mackenzie begins with the early condition of jurisprudence among the Romans, and it might, perhaps, be said that he only wants the upper portion of the fresco in Lincoln's Inn Hall to reach the Mosaic primæval! And the works he has laid under contribution show, at least, great reading; and it increases our value of his labours thus to know that his own work, as the generic result, has been composed after the anxious study of the writings of so many others. He gives a list of about 120 authors, and they are, with one or two exceptions, worthy of all respect at the hands of any professor of the law. But we do not approve of "Compendiums," "Translations," and the like, as authorities to be made use of by a judge. The authorities, however, that he has consulted on the Roman law appear to have been well selected, and with the light they gave him, he considered that system under three periods, all distinguished, as he tells us, by important changes in the political constitution of Rome. 1st. From the foundation of the city to the promulgation of the Twelve Tables, extending over a period of about 300 years; 2nd. From the Twelve Tables to the establishment of the empire under Augustus, in the year 722, after the foundation of Rome; 3rd. From the time of Augustus to the accession of Justinian, A.D. 527.

With the exception of fragments and traditions respecting

it, the law of the Twelve Tables has been lost; but Lord Mackenzie notices a few of those of its regulations which are known, such as the following:—"Insolvent debtors were treated with great severity. They were liable to be seized and imprisoned by their creditors, and after being kept loaded in chains for sixty days, might be sold into foreign slavery." The law of torts was not more liberal, for it was enacted that, "in bodily injuries the barbarous principle of retaliation was followed—an eye for an eye, a limb for a limb." As for the law of libel, how would journals and newspapers of the present day like the following regulation:—"Any one who wrote lampoons or libels on his neighbours was liable to be deprived of civil rights." But these, though very rude and coarse beginnings, contain a sufficiently enlightened recognition of the elements of jurisprudence on the subjects referred to.

Lord Mackenzie is of opinion that the scientific elaboration of law did not commence until the age of Cicero; and, in exhibiting the process of development which was applied to jurisprudence, our author justly pays a tribute to the system which, notwithstanding the wickedness and incapacity of the actual rulers, produced good and wise laws. He says: "Some constitutions by the worst Emperors, such as Nero, Domitian, Commodus, and Caracalla, are remarkable for their prudence and wisdom, which is to be attributed solely to the laudable custom of making laws with the advice of the most famous civilians in the council of State." Perhaps, however, a not less remarkable, though it be a negative, testimony to jurisprudence, is suggested by the learned author's notice of a period when other influences of an adverse and corrupting character prevailed. And more than one of the present powers of the earth, Transatlantic not less than European, might read a lesson in the following:—

"After the death of Alexander Severus, A.D. 235, the Roman Empire, formerly so powerful, but already much enfeebled, showed manifest symptoms of rapid decay. . . . Government was transformed into a military despotism; confusion and anarchy pre-

vailed everywhere ; property was not secure, and life was of no value. Amid the distractions of the succeeding times, jurisprudence, like every other branch of knowledge, declined, and the organization of Roman government being left to depend on the accidental character of one man, could never be relied on, even to secure the first necessities of civilised life."

The authority of law, however, subsequently recovered itself, particularly after the introduction of Christianity, and its development as a social principle in Roman life. The account given of the important and interesting discovery of the institutes of Gaius ought not to be passed over. Respecting it, Lord Mackenzie observes :—

"For a long time this work was only known to us from an imperfect epitome in the *breviarium* of Alaric. But in 1816, Niebuhr found in the library of Verona a palimpsest, which contained the epistles of St. Jerome, and beneath the writing he discovered the manuscript of Gaius. His discovery was verified by Savigny, and the care of deciphering the palimpsest was entrusted to Professor Göschein, of Berlin, who was assisted by Becker and Holweg. These institutes of Gaius, which were published under the title of '*Gaii Institutionum Commentarii IV.*,' are of inestimable value in what may be termed the classical study of the Roman law. They have thrown new light on some important branches of law previously involved in much obscurity, and particularly on the forms of judicial procedure, and they are of immense use in explaining and illustrating the institutes of Justinian, which are mainly founded on this long-lost work of Gaius."

The great era of law reform in Rome was the reign of Justinian, extending from A.D. 527 to 565, being a period of 38 years. Lord Mackenzie quotes Gibbon, who, in his 44th chapter, tells us that "in the space of ten centuries the infinite variety of laws and legal opinions had filled many thousand volumes, which no fortune could purchase, and no capacity could digest. Books could not easily be found, and the judges, poor in the midst of riches, were reduced to the exercise of their illiterate discretion." We in England are not in so bad

a case as this, for, although by no figure of speech could the term "riches" be applied to our legal literature, we are not certainly without books. We have not hitherto had, however, the guidance of that legal instinct, nor the happy power of applying the necessary remedy, by which the Romans benefited. But an able and philosophic lawyer is at present on the Woolsack, and it would still be no mean advantage to our system if Lord Chancellor Westbury could follow the Emperor Justinian in his amendment of the law. Various commissions, consisting exclusively of juris consults, were appointed, and the ultimate result of their labours was the Digest, or Pandects, which we are told was published on the 16th December, 533, and declared to have the force of law from the 30th of that month. The fullest powers were given to the commission which produced this great work to select only what was useful, to omit what was antiquated or superfluous, to avoid contradictions, and to make such alterations and corrections in the original works as they might think expedient, and the commission was allowed ten years to complete the undertaking—a period certainly not too long when we remember what Gibbon has before told us. But such was the vigorous industry with which they applied themselves to the work, that they completed it in three years! When or where shall we find parliamentary or royal commissions who will so exert themselves? But this is touching on too delicate and irritating a subject.

Lord Mackenzie combats the popular story respecting the supposed discovery of the Pandects at Amalfi in 1135, justly remarking that the Roman law never at any period was wholly unknown, or had lost its authority; and that the works of Justinian, and particularly the Pandects, were known and studied in different parts of Europe long before the siege of Amalfi; and he states that Peter of Valence, in a law book published by him in the 11th century, made use of the Institutes, the Pandects, and the Code, and translations of the Novels by Julian.

The learned lord devotes some interesting pages to the

subject of the revival of Roman law in Europe, in which he pays a well-merited tribute to Pothier, and, through that fine jurist, to the French School of law of which he was so great an ornament. He laments the short-comings of "Britain" as a contributor to the study, but makes no exception from this confession for his own country, although the law of Scotland is founded on the Roman jurisprudence, and the Scotch lawyers are generally understood to be more or less acquainted with it,—and an exception which, if made, his own work would go far to favour. But in the comparatively modern historical school of Germany, he finds a fitting subject of eulogy. "Facts," says Lord Mackenzie, "formerly unknown, have been revealed; ancient errors traditionally received have been exploded; and Roman law, as a science, has in many respects assumed a new aspect," mentioning the well-known names of Hugo, Haubold, Thibaut, Niebuhr, and Savigny, as writers who have given a wonderful impulse to such researches. We cannot allow the name of Savigny to pass without expressing our satisfaction at a proposal which has emanated from the Law Amendment Society, to co-operate with the effort now being made at Berlin, and indeed generally throughout the Continent, to record and perpetuate, by some public testimony, the reputation and memory of that profound lawyer. Perhaps the most fitting way to accomplish this happily conceived project is by the establishment, as is proposed, of a Foundation for encouraging the study of Comparative Jurisprudence.

The following quotation will be sympathised with by all who understand and value the true character and value of our learned profession, and it is a real pleasure to be able to connect such sentiments with the venerated name of Chief Justice Tindal:—

"The Roman law not only possesses a universal scientific value which it can never lose, but preserves also indirectly a practical value in this sense, that it forms the basis of the new civil codes of different states, besides furnishing an inexhaustible store of general principles for the decision of questions constantly occurring

in daily practice, which are not settled by statute, precedent, or usage. In giving judgment in *Acton v. Blundell*, Chief Justice Tindal observed: 'The Roman law forms no rule binding in itself on the subject of those realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived if it prove to be supported by that law—the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe.' ”

As introductory to his comparative exposition of the laws of France, England, and Scotland, the learned lord gives us an admirable “Preliminary Chapter on Jurisprudence and the Principal Divisions of Law,” in which he defines jurisprudence, justice, natural and legal, the relations of positive law and morality, the principal divisions of law, the vexed subject of natural law, positive law, pointing out the imperfections in all legal systems, against which he tells us “there is no appeal, except to the conscience. And here we are reminded of the three general precepts mentioned by Justinian, to live uprightly, to hurt nobody, and to render to every one his due. These maxims breathe a fine spirit of morality, and are evidently for the common advantage of men in their social relations; yet, with all their excellence, they fall greatly short of the golden rule of the Gospel—‘All things whatsoever ye would that men should do to you, do ye even so to them.’—Matt. vii. 12.”

The learned author does not in so many words state it, but he speaks in such terms of our division into law and equity as to leave no doubt that, in his mind, that double form of administration is a very serious imperfection in our English system. He says: “The division of the two jurisdictions proceeds on no very intelligible grounds, and leads to many anomalies;” and, while admitting the improvements of recent legislation, by which the two departments are brought nearer each other, he observes: “But, notwithstanding these improvements, many



evils still attend this double system of judicature, which occasion great expense and delay to litigants, who are frequently obliged to appeal to two tribunals to obtain redress for a single wrong, or to settle one and the same dispute. In Scotland, there is no division in its courts of law and equity, both these jurisdictions being combined and exercised by the same courts, according to the system which is understood to be universal on the Continent of Europe."

We fear it may be long before a change in our English views in this behalf will take place. Practically regarded, the subject is full of difficulties, and it would require even a more powerful engine than even this work of Lord Mackenzie's to hammer his idea into our stubborn English natures. Some are of opinion that, by judicious legislation having the object in view, a change might gradually come over the habits and opinions of the profession in this country, so that in course of time the fusion of law and equity would work itself out. But this we very much doubt. We are rather of an opinion expressed in a paper read before the Law Amendment Society, about a year ago, by Mr. Robert Stuart, who considered that the change would have to be compulsory, if at all. In that paper Mr. Stuart observes:—

"The existing practice at law is too bald and bare for the purposes of equity; and there is still to be discovered in it a devotion to its darling idea of developing the issue to be tried, whether in law or in fact, in a simple and single form which, in nine cases out of ten, I believe to be incompatible with the purposes of justice. A compulsory change in this respect, therefore, I believe to be necessary, and that if the common law courts are to have given them an equitable jurisdiction, co-ordinate and concurrent with the Court of Chancery, they must be more largely and liberally provided with the necessary expedients than at present. But all this might easily be regulated; and truly, as I have said, the whole question is one of *procedure*, particularly of PLEADING. It is *there*, in the pleading, that the fusion is to be worked out, if it is to be worked out at all; and I venture to suggest that this Society would be well employed in directing its attention to this, the practical and inevitable cha-

racter and tendency of the movement. The Bill in Equity, and the Declaration at Law, must be melted down and fused into one distinct statement, and that this will require the greatest care and nicest discrimination is obvious. But that such a thing may be successfully accomplished, I see no reason to doubt, and accomplished, too, simply by the adaptation of the existing forms." \*

A very able exposition of the doctrines of international law concludes this excellent chapter.

The remaining portion of Lord Mackenzie's book, and by far the larger part of it, although subordinate, as he himself tells us, to its general design, is occupied with his statement of the laws of France, England, and Scotland, viewed comparatively with those of Rome, which we need not say would afford ample materials for lengthened observations; but our space will not admit of any prolonged notice of what, after all, is merely a condensed and well-expressed exposition of what must be, more or less, familiar to our professional readers. We will therefore only note one or two particulars. And, in passing along, our eye has caught the following definition of slavery, taken from the Pandects: "*Constitutio juris gentium quæ quis dominio alieno contra naturam subicitur*" (D. 1. 5, 4, I. 1, 3, 2)—a definition which, without expressing any warlike devotion to the Federal cause in America, we recommend to the Confederates. On the subject of the law of marriage, Lord Mackenzie shows that the Roman law prohibited marriage with a deceased wife's sister. He says: "Under Constantine, who abrogated the ancient law, marriage was prohibited with the widow of a deceased brother, and the sister of a deceased wife." He here refers to the Theodosian code. But what will Lord Shaftesbury and Exeter Hall say, when, in stating the English law of marriage, Lord Mackenzie reminds us that the *Council of Trent* has, to this day, left its mark on the Church of England! We hear it often argued by sticklers for the essential catholicity of our church, as distinguished

\* Law and Equity—The difficulties and prospects of their fusion, pp. 19, 20.

from that of Rome, that, because the English church had no bishops to represent her at the Council, the decrees of the latter were never binding on us. The learned author, however, cites the judgment of the House of Lords in the case of *The Queen v. Millis*, in 1844, to show that after the Decree of the Council of Trent, the ecclesiastical law of England required the presence of a clergyman at a marriage; contrary to the opinion of Lord Stowell, who, in the Dalrymple case, laid it down that prior to the Marriage Act of George II., the law of England, as the Scotch law does at the present day, allowed marriage by words of present consent, without the presence of a clergyman or any religious ceremony. But on the law of marriage in Scotland we need not here dwell; we all know it, and regret its condition. We sincerely hope that the Yelverton case will be the last of its *causes célèbres*. We have indeed heard with much satisfaction that the judgment of the House of Lords in that case is to be followed by a Royal Commission to inquire into the law of marriage in the three kingdoms, with a view to its assimilation. We are glad to observe that this assimilation has, to a great extent, been already accomplished in regard to the property of the wife, and some matters of procedure in suits of divorce. This has been done by an Act passed in 1861, the 24 & 25 Vict., c. 86 (erroneously given by Lord Mackenzie's printer as c. 84), which applies to Scotland many of the provisions contained in the previous English Acts of the 20 & 21 Vict., c. 57, and the 21 & 22 Vict., c. 108, and we hope that, on this account, married women in Scotland will experience no inconvenience, as Lord Mackenzie's readers might imagine they would, for he concludes his interesting chapter on this subject with the following expression of his opinion:—

“ Though recent legislation has materially improved the position of wives, it must still be acknowledged that much remains to be done to soften the rigour of the common law as to conjugal relations in both ends of the island, and *more particularly in England*.”

We feel tempted still further to engage attention to the

contents of this carefully-written work, and we could, indeed, with pleasure find our way quietly through its pages, but our space will not admit of any lengthened review of many of the chapters which follow those we have noticed. For this we may have other opportunities, when we discuss, as we hope to do, those legal reforms and amendments which are needed for a substantial assimilation of the general law of the United Kingdom, the want of which is, we may say, daily felt to be not only an evil in itself, but practically a great social and commercial inconvenience.

For the present we content ourselves with recommending those who desire to make themselves acquainted with the Roman, French, English, and Scottish law, on the subject to which we have referred, and many others—such as Guardianship; Law of Corporations; Law of Property; Law of Prescription or Limitation; the Law of Obligations and Contract; the Law of Succession and Inheritance; the Law of Actions, and suits, and procedure in General—to consult the learned lord's book, assuring them, that whatever their professional experience and learning, they will not only find themselves interested but instructed, and thereby better and wiser lawyers than they were before. As we have before observed, there is an air of remarkable simplicity and plainness in Lord Mackenzie's style, which, to the superficial reader, might seem to be the perfunctory exercise of the careless and over-confident writer; but the discriminating student will, after the thoughtful perusal of what is to be found in this work, be enabled to appreciate that which we have called simplicity and plainness, but which is truly the clear and condensed expression of the most conscientiously elaborated learning.

We are unwilling, however, to conclude this article, without noticing Lord Mackenzie's last chapter on the Roman Bar, in which, having regard to the present condition of the profession in this country, there are some very suggestive observations.

It would appear that, according to the original Roman idea,

there was no "remuneration:" that is, in plain terms, no fees were allowed to counsel. But "after the ancient institutions were modified, and law became a complicated and difficult science, presents of various kinds were given by clients to those persons who devoted themselves to pleading. This practice having been regarded as an abuse, a law was passed by the Tribune Cincius, B.C. 204, prohibiting any one from taking money or gifts for pleading causes; but as this law imposed no penalty on those who contravened its injunctions, it was little observed, and the opinion gained ground that advocates, who required to devote their time to the special studies of their profession, were entitled to receive some recompense for their services."

It is certainly not a little amusing to observe the quiet and rather sly way in which the learned lord speaks of "the opinion gaining ground," that men who have to keep body and soul together, and move in the society of gentlemen, and be gentlemen themselves, should be "remunerated" for their services in a profession to which they devote all their time! The opinion, in fact, gained ground considerably, and the fees became excessive. Lord Mackenzie's remarks on this subject are so interesting that we must give another quotation. He says:—

"Before the overthrow of the Republic it was quite common to give large fees to advocates. M. Licinius Crassus, whose fortune is said to have exceeded three millions sterling, exacted exorbitant sums from his clients, and the same charge has been made against P. Clodius and C. Curio. Cicero himself, who lost no opportunity of boasting of his respect for the Cincian law, and who is represented by his enthusiastic admirers as a model of disinterestedness, is strongly suspected of not having always put in practice the principles which he professed. There are many reasons for believing that the sum of a million of sesterces (about £8,000), which he received from Publius Sylla, then under impeachment, and which was employed by Cicero in the purchase of a house, was neither more nor less than the fee given for his forensic services, though it was

disguised, according to common practice, under the form of a secret loan. Another mode of rewarding members of the bar was by legacies left to them by clients in their testaments. These bequests were considered honourable when they were not obtained by fraud or under influence, and Cicero boasted that he had received in this form sums amounting to upwards of twenty millions of sesterces, equal to about £166,666."

The Emperor Augustus tried to put a stop to all this by a *senatus consultum*, which revived the ancient discipline, and which actually declared that advocates convicted of having received remuneration from their clients, should be compelled to *refund* the amount *fourfold*! It is of course not surprising that this extravagant regulation utterly failed.

The practice of giving fees prevailed, and was at length admitted as a *right*, which, by the way, if we rightly understand the judgment in *Kennedy v. Broun*, it is not in this country. The *honorarium* is not a right, but a mere sanction to accept and retain a fee when given; and we cannot bring ourselves to see that this is a satisfactory state of things for the English Bar. According to the information we have received, it is not only eminently unsatisfactory and practically inconvenient, but it is fraught with the most injurious consequences to the best interests of the public. The Common Pleas, in *Kennedy v. Broun*, took too much for granted, and the learned judgment of the Chief Justice put himself and his court very much in the position of extolling a theory at the expense of the fact. The truth is, that unless a change takes place by the actual adoption of the only practice that is consistent with Chief Justice Erle's theory, the system will prove too much for the working men of the profession, and, if it be carried much further in the present direction, it may destroy the Bar altogether. As it is, its effect is exceedingly discouraging and depressing. Barristers are often observed to be not so anxious for business as might be expected, and the "briefless barrister" may even cease to be a term of reproach.

Lord Mackenzie gives an account of the course of study for,

and the mode of admission to, the Roman Bar, and he winds up with a quotation from the dialogue of M. Loisel, an eminent advocate of the parliament of Paris, in the 16th century. M. Pasquier, who takes part in the discussion, sums up his ideas of what the barrister should be in these words:—

“In short, I desire in my advocate the contrary of what Cicero requires in his orator, which is eloquence in the first place, and then some knowledge of law; for I declare, on the contrary, that an advocate should above all be learned in law and practice, and moderately eloquent—more a dialectician than a rhetorician, and more a man of business and judgment than of great or long discourse.”

We quite agree with Lord Mackenzie that, “There is much good sense in these reflections; and after the lapse of three centuries they apply with equal force to the business of an advocate in our day.” And we recommend them to the particular attention of the Bar generally, in the United Kingdom.

We now bid goodbye to our learned Lord of Session, thanking him for his book, and congratulating the profession and the British community on there being so enlightened a jurist among Her Majesty’s judges.

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## ART. IX.—JUDICIAL STATISTICS, 1861.—ENGLAND AND WALES.

### PART I.—*Police—Criminal Proceedings—Prisons.\**

**W**E are now so familiar with the annual issue of the judicial statistics that we almost fail to appreciate their full value. A perusal of this national ledger, or, rather of the report attached thereto, will, however, be always sure to evoke interest in its records. To Lord Brougham, we may observe, are we indebted for this as we are likewise for so many other amendments in our legal system. From 1839 the criminal tables given by the Home Office, owing probably to an

\* Part II.—Common Law—Equity—Civil and Canon Law—will appear in our next.

injudicious parsimony, began to deteriorate, and the items relating to the description of the offenders one by one disappeared. Since 1855, however, we have had annual issues of judicial statistics, not much differing in point of merit from the blue book now before us. This sudden development of so valuable a legal and social machine is mainly attributable to the judgment and experience of Mr. Redgrave, who had had long previous experience in criminal and police matters. The much discussed question of home or foreign penal servitude places the importance of judicial statistics in a clear light. The logic of facts can be now brought readily to bear upon this question by all, who, if no statistics were available to them, would be in a great measure in the hands of theorists not less bold than visionary. Happily, however, we now have an armoury not equally open to all disputants, but only to those who rely on facts and truth. From the regular publication of these statistics we confidently predict the happiest results both to legal and social science.

The judicial statistics for the year 1862 are, like those for the preceding years, divided into two parts, the first relating to criminal, the second to civil matters. We shall select for our record or comments the more important returns found in each part. The first division of this very interesting blue book comprises an account of the police establishments; of the criminal proceedings that took place during the year 1861; and of the state of the prisons during the same period. We thus obtain a succinct view of the means we use for the prevention, investigation, and punishment of crime. Under the head of "prisons" is given a description of the prisoners, their age, occupation, state of instruction, sex, and birthplace, so as to supply us with the most valuable information as regards not only the punishment but also the prevention of crime.

The tables of Part I. thus reflect the felons' progress in all its stages, while they also afford data for discovering the laws which preside over the apparent growth or decay of crime. An alteration has been made in compiling the



data for Part I. for the past year with respect to the definition of "known thieves." This denomination is not in the present returns applied to those who have abandoned their evil courses. The statistics are, as usual, prefaced by an explanatory report, which contains the *crème de la crème* of the matter found in the succeeding tables, a reference to which, however, cannot be dispensed with by those who may wish to obtain complete information concerning any particular items of the statistics.

The total number of the police force on the 29th September, 1861, was 21,413, being an increase on the number for 1859, which was 20,597, which again was a small increase beyond the number for 1850. The number of special constables in the twelve months was 288, and of detective officers 155. This total increase of 653, or 3·1 per cent. beyond the returns for 1860, was made up as follows, viz., in head constables of boroughs an increase of 9; in superintendents, of 11; in inspectors, of 7; in sergeants, of 106; in constables, of 645, or 3·8 per cent. There was, on the other hand, a decrease of 120 in the number of special constables, and of 5 in the number of detective officers, as compared with the returns for 1860. In the metropolitan police, likewise, there has been a decrease of 131 from the returns of the preceding year. The number of the City of London force has been the same for both years.

In the counties and larger boroughs, as a general rule, the police are described to be in a high state of efficiency. Some of the smaller boroughs, however, probably through a perverse adherence to primitive customs, and a supposed regard to their independence, have omitted to amalgamate their police establishments with those of the surrounding counties, and are, consequently, in their police behind the average state of efficiency.

The force for the discharge of the general duties of the counties and boroughs, including the metropolitan districts, and excepting only the business of the dockyards, is reduced

at present to 20,750 men. This number gives, according to the recent census, one constable for every 966 of the total population. In the following localities the number of police in proportion to the population, as calculated on the last census, varies as follows:—In the City of London (a case, however, which is stated to be almost exceptional, and where since the last census a decrease appears in the resident population amounting to 15,622, or 12·2 per cent.), the police are in the proportion of 1 to 178; in the metropolitan police district they are 1 to 504; for the town and port of Liverpool they are 1 to 442; in Bristol, 1 to 510; in Manchester, 1 to 515; in Birmingham, 1 to 785; in Leeds, 1 to 908; in Brighton, 1 to 936; in Berks, 1 to 1,101; while in Rutland the proportion is only 1 to 4,371. To what the varying proportions of police to population indicated by the foregoing returns are to be mainly ascribed is an interesting social question. Assuming that the efficiency of the force does not vary much in the different districts, why is one policeman in Rutland equivalent to four in Berkshire? In fact, statistics cannot suggest an answer to every social anomaly. The habits of a population are as important as their numbers, in respect of the amount of police force necessary to protect the districts. And even where a force is insufficient, yet, if it have been long so, it is usually over-worked, so as to meet the requirements of the neighbourhood.

The expenses of the police establishments consisted of the following items:—

	£	s.	d.
Salaries and pay . . . . .	1,178,736	10	3
Allowances and contingent expenses	37,619	11	0
Clothing and accoutrements . . .	115,933	14	1
Superannuations and gratuities . .	70,737	16	4
Horses, harness, forage, &c. . . .	32,064	0	11
Station-house charges, printing, stationery, &c. . . . .	124,454	2	5
Other miscellaneous charges . . .	19,677	0	8
Total costs . . . . .	£1,579,222	15	8

The total costs of the police for the year 1861 was £1,579,222 15s. 8d. This was an increase over the cost of the preceding year of £48,111 10s. 1d. The largest increase is under the head of "Salaries and pay," which amounted to £57,929 1s. 3d., or upwards of 5 per cent. on the total under this head. In the item of "Allowances and contingent expenses" alone there was an increase of £2,051 9s. 8d., or upwards of 5 per cent. on the total of the same head. In "Superannuations and gratuities" there is an increase of £6,033 3s. 2d., or upwards of 9 per cent. on the total. There was a decrease under all the other heads of expenditure for the year 1861. The average cost per man for the total number of police for 1861 (the basis of calculation being founded upon the whole costs of the establishments), was £73 15s. 0d.; the average for clothing and accoutrements, £5 8s. 3d. These averages were respectively £73 15s. 0d., £53 19s. 9d., and £5 15s. 10d. per man in 1860, and £72 2s. 0d., £53 13s. 0d., and £5 1s. 0d. per man in 1859. The charge for each class of police in the year 1861, and the amounts contributed from the public revenue for the several police establishments were as follows:—

	Total charge.			Contributed from the public revenue.		
	£	s.	d.	£	s.	d.
Borough police .	391,799	15	7	79,861	12	11
County constabulary	614,593	5	4	118,541	8	7
Metropolitan police .	481,302	11	9	141,903	5	5
Her Majesty's dock- yards police .	41,864	6	8	41,864	6	8
City of London police	49,662	16	4			
	<hr/> £1,579,222 15 8			<hr/> £382,170 13 7		

Three-fourths of the charges for pay and clothing are borne by local funds; the remaining fourth, upon report of efficiency by an inspector of constabulary, is advanced out of the public revenue. But all payments for allowances, horses, &c., are drawn from local funds.

The increase of the cost of the borough police amounted to £7,911 4s. 8d., or upwards 2 per cent. The increase in the amount derived from the public revenue for this branch of the force amounted to £870 6s. 8d. This increase of cost may account for the retention by the force of their efficiency, notwithstanding a reduction of their numbers. For the county constabulary the increase of expense amounted to £9,364 16s. 10d., or upwards of 1·5 per cent. For the metropolitan police there was an increase of £28,944 16s. 5d., or nearly 6 per cent. over the returns for 1860. In the expense of the City of London police there was an increase of £1,890 12s. 2d., or nearly 4 per cent. The increase on the total amount contributed from the public revenue for the police establishments in 1861 over the similar returns for the preceding year amounted to £54,676 19s. 10d., or upwards of 16 per cent. The average cost for each man of the borough police was £63 17s. 6d.; of the county constabulary, £78 10s.; of the metropolitan police, £78 3s. 2d.; of the dockyard force, £63 2s. 10d.; and of the City of London police, £79 1s. 7d. It is obvious that a single and uniform system of police establishments ought to be adopted throughout the whole country, and as well amongst the large as the small boroughs. The local authorities ought not to have any control in this matter, as there is always on the part of ratepayers less reluctance to risk a contingent danger in the shape of an increase of crime, than to prevent such a result by an increase of local expenditure.

There is no reason to doubt the general accuracy of the returns of crime furnished by the police. They have an interest in not returning lower numbers than the facts warrant, and the possibility of exaggeration by them is almost precluded by the stigma which undetected crime would cast upon their vigilance, as also by the existence of the judicial records, which these returns are either connected with or directly extracted from.

The change in the definition of "known thieves," adopted by

the police for the present returns (already noticed by us), accounts for the great decrease of 21·3 per cent. in the number of this class for 1861, as compared with those for the preceding year. There is also for the year 1861 a decrease of 14·9 per cent. in the number of receivers of stolen goods, and of 3·5 per cent. in that of suspected persons, as compared with the corresponding returns for the preceding twelvemonth. This difference may also be accounted for by the change of definition mentioned.

In the number of prostitutes and of vagrants and tramps, both juveniles and adults, there has been during the past year an increase of 2·9 per cent. for the former, and 2·2 per cent. for the latter. In the total number of all the classes of this description under sixteen years of age, there is a decrease of 587 or about 3·4 per cent. from the corresponding returns for 1860. The general total of all these classes, irrespective of ages, shows a decrease of 7·975, or about 6·1 per cent. The numbers for the four years to which the returns extend are shown in the annexed table.

CLASSES.	1861.			1860.			1859.			1858.		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
Known Thieves and Depredators :—												
Under 16 years of age .....	3,325	1,207	4,532	4,208	1,467	5,495	4,882	1,546	5,928	4,773	1,608	6,381
Sixteen years and above .....	19,215	6,059	25,274	25,407	7,012	32,419	26,478	7,132	33,610	26,772	6,879	33,651
Receivers of Stolen Goods :—												
Under 16 years of age .....	46	20	66	48	23	71	85	38	113	119	39	148
Sixteen years and above .....	2,979	731	3,710	3,520	849	4,369	3,450	844	4,294	3,410	787	4,197
Suspected Persons :—												
Under 16 years of age .....	3,261	1,117	4,378	3,473	1,130	4,603	3,878	1,370	5,248	3,912	1,512	5,424
Sixteen years and above .....	24,226	5,362	29,588	25,238	5,365	30,603	26,706	5,784	32,440	28,028	5,774	33,802
Vagrants and Tramps :—												
Under 16 years of age .....	3,331	2,351	5,682	2,968	2,163	5,131	3,279	2,167	5,446	3,285	1,942	5,207
Sixteen years and above .....	12,203	6,116	18,319	11,639	5,894	17,533	11,811	6,096	17,907	11,390	5,962	17,352
Total :—												
Under 16 years of age .....	9,963	4,695	14,658	10,517	4,783	15,300	11,624	5,111	16,735	12,069	5,091	17,160
Sixteen years and above .....	58,623	18,276	76,891	65,804	19,120	84,924	68,445	19,806	88,251	69,600	19,402	89,002

In the metropolis and the other towns grouped together in the statistics of former years, for the purpose of showing the proportion borne by the criminal classes to the whole population in each group, an increase of population has according to the last census taken place, amounting altogether to 20 per cent. over the returns of the census of 1851. There has been, nevertheless, in the same towns a decrease of 1·3 per cent. in the number of the criminal classes in 1861, as compared with the corresponding returns for 1860, while there has been an increase of prostitutes amounting to 2·5 per cent. in the same places. There was, however, in the same districts a decrease of 7·8 per cent. in the number of the criminal classes, and of 2·5 per cent. in the number of prostitutes, taken separately, in 1860, as compared with 1859. The calculations made in preceding years having been based on the census of 1851, the report contains no comparison of the proportionate number for 1861, calculated on the census of that year, with the returns of the preceding years. This course, however, if persevered in generally, will deprive the statistics of much of their real value. In the metropolis the proportion of the criminal classes to the whole population is as 1 in 231·3; in the pleasure towns, such as Brighton, Bath, &c., charged doubtless with the vices of other districts, the proportion is 1 in 96·5; in the towns depending upon agricultural districts, 1 in 108·5; in the commercial ports, 1 in 120·4; in the seats of the cotton and linen manufacture, 1 in 152·5; in the seats of the woollen and worsted manufacture, 1 in 129·1; in the seats of the small and mixed textile fabrics, 1 in 157·8; and in the seats of the hardware manufacture it is 1 in 98·6. The diversity in the foregoing proportions suggests some interesting inquiries. Why do the criminal classes abound most in the districts of the hardware manufacture (the pleasure towns we consider exceptional), and least in the metropolis and in the seats of the cotton and of the mixed textile fabrics? With regard to the metropolis, although the more serious description of personal outrages has recently greatly increased in it, yet

we can find in its immense demand for labour, the great tide of population that flows in all the leading streets, and the organization of the police, a tolerably satisfactory explanation for the very high place which London and its environs take in the foregoing list. But why do Birmingham and Manchester differ so much in the number of their respective criminals? The cotton manufacture, no doubt, gives employment to all the members, juvenile as well as adults, of a family, while the hardware manufacture is mainly conducted by adults. Yet these discrepancies of commercial condition can hardly account for the great difference in the number of criminals in both places. We leave the problem to the social reformer, for we see no distinct explanation of it. As a set off, however, to the comparative freedom from petty crimes enjoyed by Manchester, we may here observe that we find in a subsequent part of the report that the more serious description of offences, such as burglaries, breaking into shops, and robberies on the highway, are most rife in that opulent city.

In the metropolis the increase in the criminal classes during the twelvemonth precedent to the 29th September, 1861, over the returns for the previous year, amounted to less than 0·6 per cent.; in the number of prostitutes the increase was 2·6 per cent. In the pleasure towns, such as Brighton, Bath, &c., there was an increase in the criminal classes amounting to 20·8 per cent. and in the number of prostitutes of 12·0 per cent. In the Eastern group of agricultural counties there has been a decrease in the numbers of the criminal classes amounting to 26·4 per cent. under the returns for 1860. In the towns situated in agricultural districts a decrease appears in the returns of the criminal classes, and an increase in the number of prostitutes. In the commercial ports and in the seats of the cotton and linen manufacture, and of the small and mixed textile fabrics, there was a slight decrease in the number of the criminal classes. In the seats of the hardware manufacture there was a decrease of 10·7 per cent. in the number of the criminal classes during the period specified.



In the commercial ports the number of prostitutes in proportion to the population continues, as hitherto, the highest. The proportion of the criminal classes at large, as shown in the returns for 1860, was 1 in 136·8 of the total population; the proportion of prostitutes 1 in 549·6. The corresponding returns for 1861 (allowance having been made for the increase of population), are 1 to 163·0, and 1 to 636·8. We are therefore advancing, though it be slowly, in the scale of civilization, as tested by its two opposites, vice and crime.

The number of prisoners in custody on the 29th September, 1861, was, in local prisons (exclusive of debtors and military prisoners), 15,601; in the convict prisons 7,123; and in reformatories 3,199. A total of criminal classes is thus produced amounting to 148,982, or 1 in 134. The total for 1860 was 1 in 115, as based upon the census of 1851. There is, therefore, as calculated according to the late census, one of the police force to every 966 of the population; one of the criminal classes to every 134; and, consequently, one of the police to every 6·9 of the criminal classes. The total number of houses of bad character of every description was 23,916.

The tables of which we have given the foregoing account relate to the prevention of crime, the succeeding ones relate to its prosecution. These tables detail the number of indictable offences, and the disposal of the charges founded on them in each district, in periods of three months.

In the total number of crimes returned for the twelvemonth precedent to the 29th of September, 1861, there was an increase of 404, or 0·8 per cent. as compared with the preceding year, which was less prolific in this item by 3·1 per cent than the year 1859. The number of apprehensions in 1861 exceeded the returns for 1860 by 2,312, or 9·3 per cent. An improvement in the apparent, but not necessarily in the real, efficiency or veracity of the police is shown by the fact that the apprehensions were 53·5 per cent. on the number of crimes, which was a higher proportion than that of either of the preceding

years. It appears that the greater proportion of crimes is committed in the winter quarters, owing probably to the season, and the scarcity of employment that then exists, while, on the other hand, as might naturally be expected, the proportionate number of apprehensions is greater in the summer months. The total number of indictable offences committed in 1861, amounted to 50,809, and of apprehensions 27,174. The number of murders reported for the year was 106, being seven more than the number for 1860. Of these, ten were in the metropolitan police district; but no case occurred in the City of London. Connected with these cases there were 128 apprehensions, in which 90 persons were committed for trial.

The cases of concealing the birth of infants were 151, of which 97 were reported by the county constabulary; 34 took place in boroughs, and 20 in the metropolitan police district. The numbers for the same districts for the year 1860, were respectively 103, 24, and 20. The number of burglaries for 1860 was 2,221; for 1861, the number was 2,791; of these 48·9 per cent. were reported from the counties, and 51·1 per cent. from boroughs. The proportion to the whole population of persons charged with indictable offences, varies very much according to the district. In the metropolis this proportion is as 1 to 263; in Birmingham as 1 to 354; in Leeds as 1 to 330; in Liverpool, as 1 to 112; and in Manchester as 1 to 58. The more serious offences are, as already noticed by us, most prevalent in Manchester.

Upon being brought before the magistrate, 32·4 per cent. of the persons apprehended were discharged without further proceedings; 0·6 per cent. were admitted to bail for further appearance if required; 5·1 per cent. were admitted to bail until trial; 61·7 per cent. were committed to prison to await trial at assizes or sessions; and 0·2 per cent. were committed to prison for want of sureties. Of the cases, it thus appears that 67·7 per cent. were proved to the satisfaction of the magistrates. In the preceding year, the corresponding proportion was 65·3 per cent. The proportion of persons committed to trial for the same year

was 59·6 per cent. Of the total number of the persons charged with offences in the twelvemonth precedent to the 29th September, 1861, there were 20,354 males and 6,820 females.

There are about 500 descriptions of offences which must receive at least preliminary investigation by magistrates at petty sessions. Magistrates are, in fact, the only judicial authorities with whom the great bulk of the people are ever brought into contact. Many will be of opinion that some preliminary test besides the possession of property should be used in the appointment of persons invested with such important and extensive functions, and it is not improbable that the stipendiary system will be ultimately extended over the country; but there can be no question that the unpaid magistracy do their work on the whole with remarkable zeal and efficiency.

As the statistics contain a summary of the crimes of each description committed in each quarter of the year, of the number of persons apprehended, charged with each description of offence, and of the manner in which the persons apprehended were disposed of, a test is thus readily presented of the degree of success obtained by the police in the pursuit of criminals. In the class of offences against the person, the number of persons apprehended considerably exceeds the number of crimes committed. The report attributes this to the fact that more persons than one are generally concerned in the same offence, and that this class of cases admits of greater facility than most others of identifying the parties. Personal animosity, and the desire to exclude evidence, have also, we think, some part in producing this result. Of these cases, 81·1 per cent. were successfully pursued by the police, if we assume (as the statistics do) that one person only was sent for trial in each case. But this is a very rough estimate. This proportion was 77·4 per cent. in 1860, and 73·9 per cent. in 1859.

The total of all other offences recorded by the police for the year 1861 (including 209 cases of attempts to commit suicide),

amounted to 42,686, being 951 less than the corresponding returns of the preceding year. For these offences 21,552 persons were apprehended, of whom 7,401 were discharged by the magistrates. There thus remains 14,151, or 33·1 per cent., as the number of cases successfully pursued, the proportion under this category having been 29·4 per cent. for 1860.

The proportion which the total number of cases successfully pursued bore to the total number of alleged crimes, was 36·1 per cent. for 1861, 32·1 per cent. for 1860, and 32·5 per cent. for 1859.

In the number of summary charges for the year 1861, there has been an increase of 2,092, or 1·6 per cent. over the corresponding returns for 1860, in which year there was a decrease of 2·0 per cent. from the corresponding returns for 1859. Of the persons charged summarily before magistrates, in 1861, there were 315,256 males, and 79,461 females proceeded against; 219,875 males, and 43,635 females were convicted; and 95,381 males, and 35,826 females were discharged. The convictions bore a somewhat higher proportion to the total number of persons charged in 1861, than they did to the number of persons charged in the preceding year. Amongst the females, the proportion of convictions to the number of females proceeded against, has been, as was the case in preceding years, about 14 per cent. smaller than the like proportion in the case of the males. This difference may, perhaps, be accounted for partly through the gallantry of the accusers, and partly through the greater difficulty of identifying females.

The proportion of the number committed to prison, to the total of the convicted, was somewhat higher in 1861 than in the preceding year, having been 23·4 per cent. in 1861, for 20·8 per cent. in 1860. Of offences of larceny by offenders under sixteen years of age, there has been an increase of 462, or 7·6 per cent., in the present returns, as compared with those for 1860. In the total number of offences of stealing dogs, birds, vegetable productions, &c., or what we may term fancy

larcenies, there is an increase in the present returns of 6,337, or 17·1 per cent., as compared with those of 1860. In the class of malicious offences—of damage and trespass—there is likewise an increase in the present returns of 247 cases, or 6·6 per cent. over the corresponding returns of the preceding year. There were committed, in the year 1861, 2,935 aggravated assaults on women and children, 11,248 assaults on, or resistance to, peace officers when discharging their duties, and 62,498 cases of common assault. There is the small decrease of 0·7 per cent. in these returns as compared with the like returns for 1860, which again exhibited a like small decrease from the like statistics for 1859. The total number of offences against the game laws in the past year was 8,483. Under the item of night poaching, there is a decrease of 230 cases, or 21·8 per cent., as compared with the like returns for 1860. Justices, however, still appear sufficiently inclined to consider that the laws and statutes relating to game call for the most comprehensive construction. Under the head of drunkenness, we find a decrease of 7·0 per cent. in 1861, as compared with the like returns for 1860, in which year likewise there was a slight decrease from the like returns for 1859.

The total number proceeded against in each year, from 1857 down to 1861 inclusive, were as follows:—

	1861.	1860.	1859.	1858.	1857.
Total proceeded against	394,717	384,918	392,810	404,034	369,233
Convicted .....	263,513	255,803	257,810	260,290	233,474
Discharged .....	131,207	129,115	135,000	143,744	135,759

The proportion which the convictions bear to the total number proceeded against shows a progressive increase in the foregoing tables. In 1857 it was 63·2; in 1858 it was 64·4; in 1859 it was 65·6; in 1860 it was 66·4; and in 1861 it was 66·7. In the total number proceeded against by indictment and summarily there is an increase of 12,111, or 2·9 per cent. over the like returns for 1860. Comparing the numbers

proceeded against with the numbers reported to be at large, we find that the activity of the police in repressing crime has, during the year 1861, greatly exceeded that indicated by the statistics for 1860.

Of the 57 heads of offences, upon conviction for any of which by justices an appeal may be brought before the court of quarter sessions, appeals were brought only under 17 heads. There were 49 appeals in all; in 31 the convictions were affirmed; in 18 they were quashed. As the total number of summary convictions was 263,510, the original decision was thus reversed only in one case out of every 14,639 decided out of sessions.

Sixty cases were submitted under the statute 20 and 21 Vict., c. 43, for the decision of the superior courts at Westminster. Of the results of 45 of these which were submitted to the Court of Queen's Bench no return is given. Nine cases were submitted to the Court of Common Pleas; of these 6 were affirmed, and 3 reversed. Six cases were submitted to the Court of Exchequer; of these 2 were affirmed, and 4 were reversed.

The coroners' returns form the conclusion of the first division of the statistics.

The following table shows the total number of each description of verdict given at coroners' inquests for each of the last six years:—

	1861.	1860.	1859.	1858.	1857.	1856.
Murder .....	210	268	204	183	184	205
Manslaughter .....	200	144	198	197	187	271
Justifiable Homicide.....	8	8	23	4	6	6
Suicide .....	1,324	1,357	1,240	1,275	1,349	1,814
Accidental Death .....	9,213	9,225	9,241	8,947	8,930	9,716
Injuries, causes unknown .....	216	313	350	264	237	424
Found Dead.....	2,787	2,868	2,917	2,611	2,949	3,183
Natural Death.....	7,080	6,995	6,858	6,965	6,315	7,102
	21,038	21,178	20,531	19,846	20,157	22,321

Of this total, 69·9 per cent. were males; 30·1 per cent.

were females; 27·8 per cent. were infants; 8·0 per cent. were between the ages of seven and sixteen years; 48·3 per cent. were adults; and 15·9 per cent. were 60 years old and upwards.

We now come to the second branch—criminal proceedings—of the first part of the statistics. The decrease in the number of commitments observable in the statistics for each of the three last years does not continue its progress in the present returns. The number of commitments in the last year has exceeded the corresponding number for 1860 by 2,327, or 12·7 per cent., and the average of the three preceding years by 8·0 per cent. The commitments for murder and attempts to murder, taken separately, have respectively exceeded the like returns for 1860 by 30·6 per cent., and 26·0 per cent. There was a decrease, however, of 30·0 per cent. in those returns for 1860 as compared with the like returns for 1859. Excepting 1860, the returns for 1861, under this head, are less than the like returns for any other year since 1855. The report states that the crime of concealing the birth of infants shows a tendency to increase every year. Taking the average of the ten preceding years, there was a decrease in the commitments for manslaughter in 1861 of 11·3 per cent.

There has been a considerable increase in the present returns over those for 1860 of unnatural offences, rape, and assaults, aggravated and common; but a comparatively slight decrease of the number of offences of bigamy. Violent offences against property have greatly increased, although this class of offences had shown a decrease for each of the three preceding years. The number of cases of horse stealing is smaller than the same item for any other year for which we have had returns.

The number of persons tried before the various courts having jurisdiction to try criminal cases, and the proportions of the numbers before each court for trial to the total number for trial in 1861 were as follows:—

	1861.		1860.	
County Quarter Sessions Courts.....	7,965	43·5	6,632	41·4
Middlesex County Sessions	1,658	9·0	1,626	10·2
Borough Sessions Courts ...	3,917	21·4	3,547	22·2
Circuit Assize Courts .....	3,623	19·8	3,108	19·4
Central Criminal Court .....	1,163	6·3	1,086	6·8
Total .....	18,326	100·0	15,999	100·0

These proportions are almost constant for each year, so that the practitioner about making choice of a district has steady data for determining his selection.

The following was the result of the proceedings against those committed, or bailed to appear, for trial in the years 1861 and 1860 :—

	1861.	1860.
Not prosecuted and admitted evidence . . . . .	56	77
No bills found against . . . .	929	769
Not guilty on trial . . . . .	3,438	3,061
Acquitted and discharged .	— 4,423	— 3,907
Acquitted on the ground of insanity . . . . .	16	12
Found insane . . . . .	8	12
Detained as insane . . . .	24	24
Sentenced to death . . . . .	50	48
„ to penal servitude .	2,450	2,229
„ to imprisonment .	11,233	9,656
„ to whipping, fine, &c. .	146	145
Convicted . . . . .	— 13,879	— 12,068
Total committed, &c. . . .	18,326	15,999

The proportion of the number of capital sentences in 1861 to the total convictions is somewhat less than the like proportion for 1860. If no change had been made in our capital code in the latter year, the number of capital sentences for 1861 would have been fifty-three. Of the fifty capital convictions, twenty-six only were for murder. The proportion



of the number of persons sentenced to reformatories or to whipping, fine, &c., to the total convictions, was 2·9 in 1861; 3·3 in 1860. It appears that during 1861 only 610 convicts were removed to Western Australia.

The number of capital sentences for murder in 1861 was 27; in 1860 it was 17. Of attempts to murder, attended by dangerous bodily injuries, in 1861, five; in 1860, nine; of sodomy, in 1861, ten; in 1860, twelve; of burglary, with violence to persons, in 1861, three; in 1860, six; of robbery attended with wounds, in 1861, five; in 1860, three; of arson of dwelling-houses, persons being therein, in 1861, one; in 1860, one; the total for 1861 was thus 50; for 1860 it was 48. In fifteen of the capital convictions the sentence of death was carried into execution. All of those executed were under forty-six years of age.

Of the twenty-two cases brought before the Court of Criminal Appeal under the Act 11 & 12 Vict., c. 78, the judgments in three only were reversed.

Under the head of costs of prosecutions, we find that the average of these costs were, for 1859, for each case tried on indictment, £7 12s. 5d.; on summary proceedings, 17s. 8d. The corresponding numbers were, for 1858, £8 5s. 11d., and 19s. 6d.; for 1857, £9 2s. 3d., and £1 11s. 5d.; and for 1856, £9 14s. 7d., and £1 12s. 6d. The number of Mint cases, in 1861, was 433; in 1860, it was 399.

The total number of persons committed for trial and tried at assizes and sessions in 1861 was 18,438; of these 14,050 were males, and 4,388 were females. The total number of commitments on summary conviction in 1861 was 78,871; of these 55,733 were males, and 23,138 were females; of males 12,945, and of females 646, were committed to prison for debt and on civil process. The number acquitted was less than one-fourth of the total number for trial. This proportion and also the proportion of the number not prosecuted has been for the last eight years almost constant.

The number of recommitted prisoners in 1861 exceeded

the corresponding number in 1860 by 8,401, or by 9·6 per cent. Making allowance, however, for the increased number of committals, the proportion of recommittals to the total number of commitments differs only by 0·4 per cent. in favour of 1861. Little variation appears to exist in the returns for the two years, 1860 and 1861, as to the proportion which the number of those born in each county respectively bears to the total number of commitments, and as to the state of instruction of the persons committed. It appears that 0·3 represents the number of males, and 0·1 the number of females committed who had received a superior education. A greater degree of instruction is always found amongst the males. It is obvious, therefore, that reformatory and educational measures would be likely to be productive of more extensive results in the cases of females than of males. The temptations to which the latter are exposed are, it is clear, less easily obviated than those incident to the employment of females, even assuming, which is not likely to be the case, that the ill-conducted class of both sexes are equally susceptible of moral discipline.

The numbers under detention and the removals during the year were :—

	Males.	Females.			
Criminals.....	10,931	3,574			
Debtors, &c ....	1,009	51	Males.	Females.	Total.
			11,940	3,625	15,565
Committed during the year .....			96,768	32,470	129,238
Removed between local prisons during the year .....			2,735	383	3,118
Total.....			111,443	36,478	147,921

These returns exceed the corresponding statistics for 1860 by 11,191, or 11·1 per cent. as regards the males, and by 1,207, or 3·4 per cent. as regards the females. There were

removed in 1861, to reformatory schools, 1,231 males, and 301 females, and to lunatic asylums, 74 males, and 38 females. There were discharged on pardon or commutation of sentence, 104 males, and 11 females. The number executed was 14, all males. There remained in prison at the end of this year :—

	Males.	Females.	Total.
Criminals.....	12,390	3,645	16,035
Debtors .....	1,255	60	1,315
	13,645	3,705	17,350

The greatest number of prisoners confined at one time was 20,586, of whom about one-fourth were females. The daily average of prisoners throughout the year was 16,513. The report of the sanitary state of the prisons is in favour of 1861, as compared with that for 1860. The number of punishments inflicted in 1861 for offences committed in prison, was 1 to 3·8; this was also the proportion in 1860. A decrease appears in the number of every description of prison officers for 1861, except clerks and schoolmasters, in these there was an excess of 24 over the corresponding numbers for 1860.

The number of tickets of leave granted in 1861 exceeded by 64·7 per cent. the like returns for 1860, which again were more than double the number for 1859. This progressive increase is (as the report observes), owing to the fact that the provisions of the Act of 1857 annually became applicable to a greater number of persons.

An increase of 3 appears in the number of reformatory schools founded under the statutes 17 & 18 Vict. c. 86, & 19 & 20 Vict. c. 109. An increase of 12·3 per cent. likewise appears in the number of persons committed to these schools, as compared with the like returns for 1860. As in 1860, so also in the last year, the largest proportion of the commitments to the reformatories was for the longest period allowed by law. This is what should be expected. Any period short of what

might fairly be considered long enough for the instruction in those schools to impart a sound social education would be doubtless insufficient for any permanent improvement in the youths committed, and would have a tendency to bring this description of schools into unmerited disrepute. Of 189 boys committed to the Middlesex Industrial School, 72, or 38 per cent., had lost one of their parents; 13 had lost both; 7 were deserted by one of their parents; 1 by both; 1 had one of his parents in prison; 13 were otherwise uncontrolled by one of their parents; 19 by both; 16, or 32·2 per cent. of the whole number, had been under the control of one parent; 97, or 51·3 per cent. of both.

The total number of criminal lunatics under detention at the commencement of the year was 776. There were 135 committed during the year 1861; of these 37 were females. An increase of 23, or 2·9 per cent., appears in this category for 1861. There has been likewise a progressive increase in these returns for each of the last four years. Of the lunatics in custody in 1861, 234, or 24·1 per cent., of the whole number were committed for larcenies; 141, or 14·5 per cent. of the whole, for murder; and 98, or 10·1 per cent., for attempts to murder. Of the whole number (970), not less than 604, or 62·3 per cent., belong to the category of "Convicts becoming insane after trial, and removed by order of the Secretary of State." Twenty-nine of these poor unfortunates have been upwards of twenty years under detention. In Bethlehem Hospital, where the whole expenses are paid from the public revenue, the cost per head is £43 10s. 8d. As regards those hospitals, where any portion of the expenses is derived from private sources, it would be useless to strike an average of the cost, which depends so much upon the wealth, generosity, or caprice of individuals.

Now that a sound scheme of judicial statistics is firmly established, it only remains for us to develop the system in order to acquire the very best means of devising the needed legal reforms, and to test their efficacy when carried out.

## Notices of New Books.

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[\*.\* It should be understood that the Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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**The Shipping Law Manual: a Concise Treatise on the Law Governing the Interests of Shipowners, Merchants, Masters, Seamen, and other Persons connected with British Ships; together with the Acts of Parliament, Forms, and Precedents, relating to the Subject; being especially intended for Popular Use in Seaport Towns. By W. T. Greenhow, of the Middle Temple, Esq. Barrister-at-Law. London: V. and R. Stephens, Sons, and Haynes. 1863.**

To write a text-book of more than five hundred pages, with a modest contribution of original matter occupying only about one-fourth of the volume, will no doubt be regarded by the legal profession as a feat of moral courage, if not of intellectual strength. Old fashioned readers, somehow or other, have a notion that an appendix ought to form a mere subordinate adjunct to a book. Forms, schedules, and matters of detail are supposed to find a fitting place in the last few pages printed in small type. Mr. Greenhow's Manual is in this respect exceptional. It is a volume of appendix, with a little book attached.

Such are the facilities for "padding" in legal literature, that even success in the art does not necessarily imply a high order of merit. A month would be ample time for any industrious author to get up a book on this principle. First of all, correlate Acts of Parliament should be collected, arranged, and incorporated in their entirety. The earlier portion of the volume should contain, in good English, a paraphrase of the said statutes, with references at the foot of the page to the sections and chapters. A digest should lie close at hand for occasional consultation, and the marginal notes of a few cases, as pertinent to the subject as may be, should be interspersed here and there. Finally, some schedules, precedents, forms, &c., may be liberally thrown in at the end, to give bulk and solidity to the whole. The advantages of having all the statutes relating to any given department of law, collated and methodically arranged in

one volume, are undeniably great. What we complain of is, that under the guise and at the price of an original work, we are only purchasing extracts from the statutes at large, set off by a few chapters of preliminary comment. Mr. Greenhow's *Shipping Law Manual* is nothing more. The book proper—which is begun, continued, and ended in 155 pages—affords very scanty evidence of research or originality. A remarkable delicacy is exhibited on the subject of citing cases, the preference being given to the older and more classical decisions. This, it must be allowed, is not an accidental circumstance, but the result of the author's plan and design. In the introductory chapters it is explained "that the present book has been compiled, not principally with a view to aid the professional reader, for, as will be gathered from its title, it is devoted to rudimentary matters, rather than to minute inquiries and intricate disquisitions, and scarcely professes to hold forth much instruction to those who must be assumed to be already nearly proficient. . . . But it is especially intended, as will be seen, for the general reader, whose interests, nevertheless, require him to be acquainted with the leading features of shipping law, and it has been endeavoured, in his behalf and in order to adapt it to his purpose, to confine its discussions as far as possible to elementary matters, and to narrow the subjects dealt with so as to avoid an embarrassing accumulation of matter." Again, with respect to the cases cited, the author adds, "the book does not profess to afford a complete catalogue of decided cases, or even of all which have been contributory to the establishment of a principle or doctrine now in active force, for it has been thought that to do so would contribute more to the embarrassment than advantage of the less instructed reader, by tempting him to labour through—in many cases fruitlessly, and at the risk always of filling his mind with many crude and contradictory impressions—a long series of decisions, in the hope of finding one precisely suitable to his occasion. . . . But, although the volume is published more expressly for the assistance of the general reader, it is hoped that it may not be entirely unserviceable in the hands also of the profession."

As a rule, the writing of law books for "general readers" is about as useful as a popular edition of the *Pharmacopœia*, or a new *Integral Calculus*, "for the million." For really practical purposes it is generally worse than useless. Half our obstinate litigants are men who have "a little learning," which leads them to do "dangerous things." No doubt, many readable books have been written on legal subjects, but they invariably avoid the region of dry practice. "Blackstone's Commentaries," and "Lord St. Leonards' Letters on Real Property Law," might be read with advantage, and even with pleasure, by every English gentleman; but no one will be allured thereby to attempt the ruinous experiment of becoming "his own lawyer." Mr. Greenhow is not consistent. If the *Manual* is intended for professional men in actual practice, the information given is too scanty and elementary; if for

the "general reader," why load the book with forms, schedules, &c., of no use but for practical purposes? The Manual may possibly supply a want and prove very useful. We venture to suggest that it would not be less useful if reduced to one-half its present bulk. The statutes, as far as we have been able to pursue the verification, have been accurately transposed; and the forms, precedents, &c., appended, are such as may be safely adopted. The chapters on General Average, on Demurrage, and on Salvage and Wreck, furnish abundant evidence that the author has the power of seizing salient principles, and of expounding the same with clearness and force. Let him in future check the ambition of writing big books with little labour, and, in consideration for the pockets of his professional brethren, bear in mind the important distinction between book making and writing a book.

**An Elementary View of the Practice of Conveyancing in Solicitors' Offices, with an Outline of the Proceedings under the Transfer of Land and Declaration of Title Acts, 1862, for the Use of Articled Clerks.** By Edmund Smith, Esq., B.A., late of Pembroke College, Cambridge, Attorney and Solicitor. London: Butterworths, 7, Fleet Street. 1863.

THIS is a Manual of Conveyancing Practice, written by a solicitor, expressly for the use of articled clerks. The author does not profess to expound the great principles of real property law, but rather to present a concise elementary view of the daily business transacted in the office of a conveyancing solicitor. For the first twelve months of his articles, the student will, no doubt, find it a very useful *vade mecum*. Instead of plodding on blindly, and picking up his legal knowledge from hand to mouth, under the guidance of his experienced principal, bewildered with abstracts and requisitions, rushing hither and thither, doubtful if not aimless, with drafts, deeds, schedules, and memoranda—he will be able, by consulting these chapters on Purchases, Sales, Mortgages, Bills of Sale, Leases, Settlements, Wills, &c., to take a calm and comprehensive view of his work. Half the instruction given in an attorney's office is at first lost, and much time absolutely wasted, from not perceiving the scope of each proceeding, and the bearing of each step upon the final result. Under a sensitive dread of being a bore by propounding too many questions, difficulties are slurred over, and opportunities lost for many years, perhaps for ever. We feel confident that Mr. Smith's little treatise will help to clear away many of those perplexities which puzzle the student, and enable him, instead of groping along in the dark, to work systematically and with well defined purpose. The information given is, as far as we have been able to discover, quite accurate, and all the matter under the category of "advice" deserving of the best consideration. But there is a minuteness about unimportant details, and here and there



a conspicuous surplusage which might well have been avoided. The merest tyro does not require to be informed that after all the formalities of purchase and sale have been gone through, "it will now only remain for the clerk to ascertain the purchaser's address;" nor is it at all necessary that a legal manual should be occupied with information which might be found in the London Directory, as, for instance, that the "Middlesex Registry Office is in Bell Yard, Chancery Lane, London." We observe also, in passing, that it would have been more in accordance with the observances of literary courtesy if the greater part of page 8 (obviously extracted *ipsissimis verbis* from a well-known chapter in "Williams's Real Property"), had been adorned with the usual inverted commas. These are, however, faults of minor importance. There is a method, clearness, and completeness about the book which will, no doubt, ensure for it a large circulation. The thirty-eight pages devoted to an explanation of the Transfer of Land Act, 1862, with the orders that have been issued, will be read with much interest by conveyancers. After the lucid interpretation of the Act and Orders throughout the 8th chapter we read its concluding paragraphs with some regret. The author concludes somewhat abruptly, by stating, "I have said nothing of the means of opposing registration upon notice of the application; nothing of the initiative precaution of entering a *caveat* against a property being registered. I have said nothing about the means of cautioning the registrar against entering instruments and dealings with the property when it is already registered, or of the notice to which the cautioner is entitled. I have said nothing about equitable charges by deposit of the land certificate; nothing about the requirement of having all title deeds of the registered property stamped with an office stamp; nothing, finally, about getting a property off the register." If on account of the novelty of the Act there were really nothing to say on these highly important subjects, the omission would have been creditable to the author's judgment and sense of duty. That, however, is not so. Considering the many merits of the work, we have no doubt Mr. Smith may be called upon at a future time to prepare another edition, and we trust that, as to the surplusage above alluded to, more important matter may be substituted, or at all events appended thereto.

The Law of Joint-Stock Companies; containing the Companies Act, 1862, and the Acts incorporated therewith; with Copious Notes of Cases relative to Joint-Stock Companies, the Rules and Forms of the Court of Chancery in Proceedings under the above Act, and Forms of Articles of Association. By Leonard Shelford, of the Middle Temple, Esq., Barrister-at-law. London: Butterworths. 1863.

THE object of the Companies Act, 1862, was to incorporate, in a single and exhaustive statute, the enactments which regulate the



formation, management, and winding up of Joint-Stock Companies. While many sections from other Acts of Parliament relating to Joint-Stock Companies have been embodied, *totidem verbis*, on the other hand some of the most important provisions are entirely new. Thus we are now made acquainted for the first time with companies "*limited by guarantee*," i. e., companies in which the members may stipulate for a limited contribution to the assets upon the winding up of the company. In the case of a company limited by guarantee, it is enacted that "no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association." Practitioners will also bear in mind, that the independent jurisdiction of the Court of Bankruptcy, in relation to the winding up of joint-stock companies has been abolished, and their interference in such matters will henceforth be under the direction and control of the Court of Chancery. Since the Act of 1859, the 21 & 22 Vict., c. 78, a special officer has been appointed, called the creditors' representative, whose business it was to protect the interests of the creditors during the process of winding up the affairs of the company. That office has also been abolished. Lastly, insurance companies, instead of forming a distinct group, and governed by their own special rules, are made subject by this statute to the same provisions as other companies. With these, and a few less important exceptions, the Act of 1862 is almost a transcript of former joint-stock companies' Acts, having the invaluable advantage of containing in one statute all the written law on the subject. Very many of the reported decisions will, therefore, be still applicable, and only required to be logically arranged under the provisions of the new Act.

Mr. Shelford's reputation as a legal author, it is needless to say, has been long ago established. Although some fifteen standard text-books bear the author's name—text-books that are on the shelves of almost every lawyer's library, and consulted in the course of practice with the utmost confidence in the reliability of the information they furnish—the present volume, while not so elaborate, and having a narrower scope, will bear comparison with the best of them for clearness of diction, unity of design, and thoroughness of execution. Taking the "Addenda," which must have been sent off to press at the eleventh hour, probably after the bulk of the book was in type, the decided cases are brought down to almost the last published in the current reports. They have been selected, with much discrimination, and presented to the reader with a conciseness which never obscures the meaning. The explanatory notes are always pertinent and instructive; not mere paraphrases of the section, set off with a random case or two picked out of a digest. The observations on the winding up of companies and associations, for instance, under the 99th section; upon fraudulent preference, from page 188 to page 206, may be referred to as excellent specimens of clear and useful writing. Mr. Shelford has also incorporated in the same volume the following cognate statutes, with notes and explana-

tions:— *Railway Companies' Arbitration Act, 1859*; *Criminal Offences by Directors, &c., of Public Companies, 24 & 25 Vict., c. 96*; *The Industrial and Provident Societies' Act, 1862, 25 & 26 Vict., c. 87*. Three important schedules are given, as well as the rules and orders of the High Court of Chancery, to regulate the mode of proceeding under the Companies' Act, 1862, while the concluding chapter is devoted to the consideration of the formation of companies by letters patent. By this volume Mr. Shelford has added to his reputation as a commentator, and increased the indebtedness of the profession by a valuable and very welcome contribution to the lawyer's library.

**An Analytical Digest of the Cases published in the New Series of the "Law Journal" Reports, and other Reports in the Courts of Common Law and Equity, and Appeal in Bankruptcy, in the House of Lords, the Privy Council, in the Court of Probate, the Court for Divorce and Matrimonial Causes, and in the High Court of Admiralty. From Michaelmas Term, 1855, to Trinity Term, 1860, inclusive. By Francis Towers Streeten, Esq., and George Stevens Allnutt, Esq., Barristers-at-Law. London: Edward Bret Ince, 5, Quality Court, Chancery Lane.**

THIS Digest is in continuation of seven others, published at different times, containing the cases reported in the "Law Journal" reports, and other contemporary reports, since the year 1822.

**Principles of the Law of Scotland, contained in Lord Stair's Institutions; with Notes and References as to Modern Law. By Patrick Shaw, Member of the Faculty of Advocates, and Sheriff of Chancery. Edinburgh: T. and T. Clark, Law Booksellers, 88, George Street. London: Stevens, Sons, and Haynes; and Simpkin and Co.**

LORD Stair published two editions of his "Institutions of the Law of Scotland," the one in 1681, and the other in 1693, two years before his death. A period of more than thirty years has elapsed since the latest edition of this standard work was published. "During that time," says the author of the present volume, "great and important changes have been made by Parliament in almost every department of our law." Mr. Shaw has, therefore, attempted to embody the principles of the law of Scotland contained in Lord Stair's "Institutions," "in a form which may facilitate the perusal of that great work, and at the same time point out the changes which have been made in Scotch jurisprudence."

**Remarks on the Constitution and Practice of Courts Martial ; with a Summary of the Law of Evidence as connected therewith ; and some Notice of the Criminal Law of England with reference to the Trial of Civil Offenders.** By Captain Thomas Frederick Simmons, R.A. Fifth Edition, revised. London : John Murray, Albemarle Street.

THE fifth edition of this well-known and most useful work has been carefully revised throughout, with reference to the Mutiny Acts and Articles of War of the present year, the Naval Discipline Act, 1861, the Criminal Law Consolidation Acts, and other recent statutes, and the Queen's Regulations for the Army, dated 1st December, 1859, and the warrants, orders, and circulars now in force.

**A Supplement to the Seventh Edition of Stone's Practice of Petty Sessions.** By Lewis W. Cave, of the Inner Temple, Barrister. London : V. and R. Stevens, Sons, and Haynes.

THIS supplement contains chapters on the summary jurisdiction of Justices of the Peace under the Criminal Law Consolidation Acts, and under the Act for the Prevention of Poaching. The decisions on the repealed statutes are also given, wherever they are calculated to assist in the construction of, or to ascertain the practice under, the substituted enactment.

**A Handy Book on Property Law ; in a Series of Letters by Lord St. Leonards.** Seventh Edition. William Blackwood and Sons, Edinburgh and London.

THE seventh edition of this most useful and popular little book is re-issued, with a portrait of the author, and the addition of a letter on the new laws for obtaining an indefeasible title. The edition, neatly got up for the sum of three shillings and sixpence, is likely to increase the wide and well-deserved popularity of the work.

**A Concise Treatise on the Construction of Wills.** By Francis Vaughan Hawkins, M.A., of Lincoln's Inn, Barrister-at-Law, Fellow of Trinity College, Cambridge. London : William Maxwell. Dublin : Hodges, Smith, and Co. 1863.

THIS work possesses so many merits that we feel it would be unfair to the author, as well as to the profession, upon the eve of going to press, to write only a short notice. We propose, therefore, to reserve our observations for the next Number.

**Handy Book on the Diminution of the Poor Rates.** By Standish Grove Grady, Esq., Recorder of Gravesend. London : Wildy and Sons. 1862.

THIS manual has been prepared by Mr. Grady, for members of Parliament, county magistrates, boards of guardians, and ratepayers. The author quotes largely from Mr. Pashley's work on "Pauperism and the Poor Law;" Mr. Scratchley's work on "Industrial Dwellings;" Mr. Gilbert's pamphlet on "Poor Law Reform," and the Report of the Poor Law Commissioners and Inspectors. The first portion contains a concise historical statement of the origin and development of our poor laws. But the main object of the work is to show "that the law of settlement should be wholly repealed; that the various provisions for raising and administering relief to the poor be consolidated into one statute; that the sum needed for such relief be raised by parochial rates on real property; that two-thirds of this sum be raised by a pound rate equal throughout the country, and the remainder by a further pound rate, raising in every parish a sum equal to one-third of the actual expenditure of such parish." Referring to the sufferings of the poor in Lancashire, Mr. Grady deprecates the legislation of 1862, in favour of raising loans to meet the exigencies of the crisis, and arguing with great force in favour of a rate extended in and extending over the widest area. "The real property of the kingdom," observes the author, "is, at an under estimate, valued at £120,000,000 a year; a rate of 4*d.* in the pound upon that property would produce £4,000,000. This would not be felt by any one, whereas, by confining the relief to a parish or union, or even a county, the burden falls disproportionably heavy upon the few, which would be light if cast upon the whole." The importance of this question is becoming, and will become every day, more grave. The difficulty must be grappled with, and we think the learned Recorder has contributed some help towards its solution, by the accurate information, the catholic sentiments, no less than the deep philanthropy which adorn the pages of this unpretending little treatise.

**An Elementary View of the Proceedings in an Action at Law.** By John William Smith, Esq., late of the Inner Temple, Barrister-at-Law, Author of "Leading Cases," "A Compendium of Mercantile Law," &c. Eighth Edition. Adapted to the present practice. By Samuel Prentice, Esq., Barrister-at-Law, Editor of "Chitty's Archbold's Practice." London : V. and R. Stevens, Sons, and Haynes ; H. Sweet ; and W. Maxwell. 1863.

SMITH'S Action at Law is so well known, and its merits so thoroughly appreciated, that it would be worse than useless, in reviewing the eighth edition, to enlarge upon its general character. The clear analytic powers of the author of the "Leading Cases"

and "*Mercantile Law*," have raised this *Elementary View of the Proceedings in an Action at Law* to the rank of a standard book. With students, it has always been very popular. They can consult no better authority ; none so simple, for the purpose of obtaining a preliminary conception of proceedings in a suit at common law. *Hunter's Suit in Equity*, and one portion of *Goldsmith's Doctrine and Practice of Equity*, have been composed for Chancery practice, on the plan laid down by the author of this text-book. The last edition contains new and valuable information on costs, execution, the examination of articted clerks, and arbitration. The chapter on Arbitration is the longest and most valuable addition ; and for this we are indebted to the able editor, Mr. Prentice. The student will find in this chapter the form of submission to arbitration by consent ; the rule as to amending, enlarging, and revoking submission ; the mode of proceeding before arbitrators, how an award may be altered, published, set aside, and enforced, together with a statement of the costs incurred, and the stamps to be impressed. He will also find a profitable reading on the *Common Law Procedure Act, 1854*, as to compulsory arbitration. Several recent cases are cited to illustrate the judicial interpretation which has been given of the sections of that statute, bearing on the subject of compulsory arbitration. The chapter on Execution, instead of being a meagre outline as in previous editions, now contains a very ample exposition of the process of the *Common Law Courts* after judgments signed. The practitioner will soon outgrow the information herein contained, and be driven to consult other authorities for learning too minute and intricate for a work of this design ; but to the student entering upon the labour of mastering one department of our great jurisprudence, viz., the common law, we can recommend him to no better manual than to this clear and concise history of an *Action at Law*.

*The Practice of the Court of Probate in Common Form Business.*

By Henry Charles Coote, F.S.A., Proctor in Doctors' Commons.

Also a *Treatise on the Practice of the Court in Contentious Business.* By Thomas H. Tristram, D.C.L. Fourth Edition.

London : Butterworths. 1863.

A GREAT portion of the learning of this book was, until very recently, kept as the secret mystery of a distinct branch of the profession. Mr. Coote claims the honour of being the first who, in a monograph form, has explained the principles which regulate the granting of probate and letters of administration. Since the Legislature has thrown open to the whole profession the practice which formerly had belonged exclusively to the Proctors, the necessity of such a work as this was imperative and obvious. Mr. Coote has incorporated with the new Statutes and the modern practice as established by the distinguished Judge who presides over the

Court, a vast amount of ancient lore, with which many of us have hitherto not been familiar. His book, though on the dry subject of practice, is one which might be read through with more than ordinary interest and advantage. In some respects it appears to be wanting in completeness. It can scarcely be said to be to the Court of Probate what Lush and Archbold are to the Common Law Courts at Westminster. The reason for this is evident; it is so, because the Probate Court is a new one, and has much of its practice unsettled. When we say that Mr. Coote has done his work well, we only reiterate the recorded verdict of the profession. In this, the fourth edition, Mr. Coote has made such additions to the original work as were rendered necessary by the issuing of a new and consolidated set of rules and fees for the Court of Probate, by the special practice arising out of the 24th and 25th Vict. c. 114, and by the recent decisions of the learned Judge of the Court. After a careful perusal of the revised edition, we are able to say that Mr. Coote has spared no trouble to make his valuable work still more useful to the profession. The book is divided into two parts; the former written by Mr. Coote, on the common form business of the Court of Probate; and the latter by Dr. Tristram, on the contentious business of the Court. Common form business is defined to be "the business of obtaining probate and administration where there is no contention as to the right thereto, including the passing of probate and administration through the Court of Probate in contentious cases, when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging *caveats* against the grant of probate and administration." In the treatment of this part of the subject, Mr. Coote gives an elaborate explanation, extending over 192 pages, of the principles which regulate the granting of probate and administration. He then very ably discusses the purely practical steps which must be taken by solicitors and proctors in making their application in common form; and in the Appendix we have a most useful paper, entitled, "Directions for describing Testators or Intestates, and persons applying for Probate and Administration," together with all necessary forms, with the statutes, rules, and tables of fees. Mr. Coote has found a worthy coadjutor in Dr. Tristram. The practice of the Court in contentious business has been treated by him in a very able and concise manner. Dr. Tristram not only explains the ordinary practice of the Court in proceedings on motion, by petition, and in suits for obtaining probate in solemn form, but also touches upon the jurisdiction which has been given to the county courts in contentious business. We wish the learned Doctor had treated this more fully. The judges and practitioners of the county court stand in need of further information and guidance in connexion with this subject—information which Dr. Tristram is eminently qualified to supply.



**The Criminal Law Consolidation and Amendment Acts of the 24th and 25th Vict., with Notes, Observations, and Forms for Summary Proceedings.** By Charles Sprengel Greaves, Esq., Q.C. Second Edition. London: V. and R. Stevens, Sons, and Haynes; H. Sweet; and W. Maxwell. 1862.

THE name of Mr. C. Sprengel Greaves will be historically connected with the consolidation of the criminal law in this country. Considering the valuable services rendered during many years by the author, to whose work we now call attention, no one will think the following apology for its publication at all in bad taste:—"As I had the honour to be entrusted with the preparation of the 14 and 15 Vict., c. 19, 'An Act for the Better Prevention of Offences,' and the 14 and 15 Vict., c. 100, 'An Act for the Further Improving the Administration of Criminal Justice,' and watched those Acts step by step as they passed through Parliament, as well by attending the committees of both Houses of Parliament upon them, as otherwise, Lord Campbell, C. J., strongly urged me to publish them, with notes explaining the alterations in the law which were effected by them, and the reasons for those alterations; and, accordingly, I published a little work with that object; and well assured am I that if Lord Campbell had survived the passing of the present criminal bills, he would have urged me to undertake a similar publication with respect to them. Impressed, therefore, with that conviction, and as a small tribute to the memory of Lord Campbell, I determined to publish these Acts."

Within a few months of the passing of the Criminal Law Consolidation and Amendment Acts, several text-books were issued, bearing the names of well-known authors. Although the materials were in common, each author pursuing his own plan, and writing with a special object, the results have been different, but we think in every instance valuable. Mr. Archbold has embodied in his edition a considerable amount of learning on criminal law which had before appeared in the larger Practice, giving, what we do not find in the other text-books, forms of indictment pursuant to the new Acts. Mr. Davies, in addition to critical and explanatory notes illustrated by cases, has supplied an admirable table of indictable offences, as well as of summary convictions, similar to those furnished by Okey in the Magisterial Synopsis. The edition of Mr. Saunders and Mr. Cox has been well received, on account of peculiarities of arrangement, special facilities for reference, and pointed observations upon important topics. Mr. Greaves has adopted a plan which has the merit of being simple, complete, and logical. "The Acts have been accurately printed from the statutes themselves, and to each section a note is appended. If the enactment be old and unaltered, the note simply states the enactment or enactments from which that section is taken. . . . Where a clause is new, either in England or Ireland, this is pointed out. Where a clause or part of a clause is

altogether new it is printed in *italics*, and the note explains the reason for it, unless, indeed, the reason be too plain to need any explanation. . . . Where any part of any old enactment is omitted or transposed, the note points this out, and assigns the reasons for it. In a few instances, where it has seemed that some doubt which existed on some old enactment might be removed, or some other useful object might be obtained by deviating from the proposed limits of the work, I have ventured to do so."

That the first edition should have been disposed of in the short period of one year, notwithstanding the publication of rival works of great merit, might be taken as a good proof that the method of expounding the new statutes pursued by Mr. Greaves is well adapted to meet the wants of the profession. The former edition was confined to pointing out the alterations effected by those Acts, and the reasons for them. To the present edition is added an Appendix, containing plain and concise directions as to such of the summary proceedings under the new statutes as seemed to require them. New forms for summary proceedings under the Larceny and Malicious Injuries Acts, have been formed by the author, from those in Jervis' Act, 11 and 12 Vict., c. 43, with such alterations as to adapt them to proceedings under these Acts. Valuable new matter will also be found on the issuing of Search Warrants, forms for which are given, together with directions as to the mode of obtaining them.

Before concluding this notice, it is but simple justice that one word of praise should be said with respect to the introductory chapter. It is a far more elaborate and complete history of criminal law legislation than can be found in the other text-books to which reference has been made. This was to have been expected. For nearly nine years the learned author was himself engaged, almost continuously, in the difficult and important work of consolidating the criminal law. Many of the amendments originated with himself; and perhaps "no one has had the same, or, indeed, anything like the same means of acquiring that information which, if not absolutely necessary, is very useful for writing such a work."

*The following books have been received, and will be noticed:—*

The Transfer of Land and Declaration of Title Acts, 1862. By R. Denny Urlin. London: William Maxwell; Henry Sweet; and V. and R. Stevens, Sons, and Haynes.

Shall We Register Title? or, Objections to Land and Title Registry Stated and Answered. By Tennison Edwards, Esq. London: Chapman and Hall.

Jurisprudence. By Charles Spencer Mark Phillips. London: John Murray. 1863.



## Events of the Quarter.

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IN our Number for November last we published an article on the duties of Lords Lieutenant and their Deputies, consisting chiefly of a letter from Mr. John Harward, Clerk to the Lieutenancy of Worcestershire, to Lord Lyttelton. The letter contained new and elaborate information on the subject, and attracted considerable attention. Mr. Harward is anxious we should state that he was assisted in the preparation of the letter by Mr. John Whitehead, Barrister, of New Square, Lincoln's Inn.

The exercise of belligerent powers at sea by the American States, and the new position in which England finds herself as a neutral in maritime war, have produced for some time past a succession of questions on international law, accompanied, we fear, by increasing acrimony on both sides of the Atlantic. As we write, the relations between the Governments of London and Washington are becoming so menacing that it is difficult to see how peace is to be long preserved unless some frank understanding be speedily arrived at. On the one hand, it is believed that a strong despatch from Mr. Seward is now on its way across the Atlantic in reference to the Alabama; and on the other, it is certain that Lord Russell has addressed remonstrances to the Cabinet at Washington concerning the seizure of British vessels by American cruisers, and the conduct of Mr. Adams in issuing a permit to an English ship trading to a neutral port. Both nations are, therefore, indulging in the unprofitable but irritating task of recrimination; each angry at its own injuries, and but little disposed, we fear, to do justice to the other. In another part of this Number we have expressed our opinion at some length, and without hesitation as to the wrong done in the case of the Alabama; and it is equally clear that neither Mr. Adams nor Admiral Wilkes have kept within the limits of international comity in their dealings with England. Under these circumstances there would be little real danger of a rupture if the affairs of nations were conducted on the same principles of common sense and equity as those of individuals. If in private life two gentlemen find themselves brought into unfortunate relations with each other, owing to misunderstandings, and offence given on each side, nothing is easier or more common than by accepting a sort of set-off for the mutual injuries, through frank explanations, or the intervention of a third party, to produce a reconciliation, which not only renews, but can even increase, friendship. Nor is it hopeless to obtain the same result between angry nations, however excited and aggrieved, if their affairs can only be kept in the hands of upright, cool-headed men

unruffled by personal considerations, who will pursue through all difficulties the paramount object of peace. But, unhappily, this condition is not being fulfilled. The inevitable disputes which have arisen between ourselves and the Americans, as neutrals and belligerents, are passing from the region of diplomacy and of the calm dignity which Lord Russell has well maintained, into the passion of popular debate, and the unscrupulous writing and talking of political faction. Mr. Roebuck, in putting a question in the House of Commons, on April 23rd, thought fit to indulge in a speech of the most intemperate and offensive description; and some minor lights of the Conservative Opposition succeeded in imitating his bitterness of tone, though not, perhaps, his pointedness of expression. There can be no greater blot on our civilization than that war should be capable of being produced between two nations, without the pretence of the independence, safety, or real honour of either being concerned, by the reckless tongues and pens of a few politicians on each side. But such an event is, above all, indefensible, when it is made to arise out of a pure question of international law, which can be decided by reference to known principles and ascertainable rules, carrying in their application nothing but honour to both parties who abide by them. We sincerely trust, whatever the event may be, that our Government will keep within the strict limits of public law, and while demanding nothing but that law for itself, be ready to act fully up to its spirit as well as its letter in dealing with the Americans.

The Commission (alluded to in our last Number) appointed by her Majesty to inquire into the operation of the Acts relating to Transportation and Penal Servitude, and with the manner in which sentences of transportation have been, and are, carried into effect, met for the first time on the 2nd February, and has since continued its sittings twice a week for the examination of witnesses. It is believed that the report will be presented very shortly, and we shall probably notice it at length in our next number. The subject has been abundantly debated in its various aspects.

A special meeting of the National Association for the Promotion of Social Science, was held at Burlington House on the 17th of February, to discuss the expediency of renewing the transportation of criminals, when a resolution, disapproving of the punishment, was moved by Mr. Hastings, and carried by a large majority.

At a meeting of the Council of the Association, on the 19th February, the following resolutions were unanimously agreed to, on the motion of Mr. Hastings, and Mr. Stephen Cave, M.P. :—

“1. That the failure of the present system of convict discipline in England is chiefly due to the short sentences frequently passed on habitual criminals, the want of an efficient probationary stage for convicts under sentence, and of police supervision over discharged prisoners.

“2. That these defects would be remedied by adopting and carrying out the principles of the convict system which has been so successfully administered in Ireland.

"3. That it is not desirable to attempt any return to the old system of transportation, which, apart from the opposition it would provoke from the colonies, would entail heavy and permanent expense on this country, without producing any adequate advantages, or any results which would not be better, as well as more cheaply, obtained by well-regulated convict establishments at home.

"4. That at the same time it is most desirable to encourage the emigration of criminals sentenced to penal servitude, who shall have, by steady industry and labour, whilst in prison, or whilst under probation, saved a sum sufficient to enable them to defray the whole or the greater part of their passage money to any colony they may select."

A full report of the transportation debate has been published, and may be obtained at the office of the Association, or at Miss Faithfull's, Princes Street, Hanover Square.

The Law Amendment Society has also been active on the subject, and a report founded on the following resolutions of a special committee appointed to consider the question of convict discipline is now in preparation :—

"1. That it is not desirable to revive the system of transportation, but it is desirable to promote the emigration of criminals sentenced to penal servitude, who shall have by steady industry and labour, whilst in prisons, or whilst under probation, earned a sum sufficient to enable them to defray the whole or the greater part of their passage money to any colony they may select.

"2. That the present system of short imprisonments requires revision.

"4. That it is desirable that the convict system should be remodelled on the principle of the convict system now in force in Ireland.

"5. That for this purpose the preliminary imprisonment should be made more severe ; that a system of marks should be established in the second stage of labour ; that intermediate prisons on the plan of Lusk and Smithfield should be organised, and that a strict supervision should be exercised over convicts discharged on tickets of leave, the conditions of which should be stringently enforced.

"6. That a report be drawn up, founded on the resolutions passed by this committee, and that such report, when adopted by the society, be forwarded to the commissioners on convict discipline."

In consequence of some observations addressed to the Society by Mr. Trower, the following resolutions, described as on "Law Reporting," were proposed and agreed to:—

"1. That it is highly expedient that the reported decisions of our superior courts of law in England and Ireland, from the earliest to the present time, should be forthwith expurgated and consolidated, and their undue accumulation for the future be, if possible, prevented.

“ 2. That to this end a Royal Commission should issue to inquire and report what are the best means of effecting such expurgation and consolidation, and of preventing such an accumulation, and, generally, of improving the present system of law reporting.

“ That a deputation of this Society do forthwith wait on the Lord Chancellor, the Chancellor of the Exchequer, and the Home Secretary, to lay the views of this Society before them, and urge upon them the immediate adoption of these resolutions.”

It will be observed, however, that these resolutions go much further than their nominal purport, and embrace, in fact, no less a project than the revision of the whole of our unwritten law. The Chancellor, we believe, entertains some such scheme, and perhaps his great energies might be capable of grappling with the difficulties, which, in sober truth, would be enormous. At all events, his lordship seems to have given an attentive hearing to the deputation from the Law Amendment Society, and after dilating on the subject for some time, expressed his desire for a further interview when the plan has become more matured. The deputation, we learn from the papers, consisted of the Right Hon. T. E. Headlam, M.P.; Mr. Daniel, Q.C.; Mr. Thomas Webster; Mr. James Vaughan; Mr. Pulling; Mr. Edgar; and the Secretary, Mr. G. H. Palmer.

The Society has also had before it an interesting paper by Mr. R. R. Torrens, the Registrar-General of South Australia, on the Transfer of Land by Registration of Title, as now in operation in Australia, under the “Torrens system.” We have perused this paper with much interest, and commend it to the attention of our readers.

Mr. Serjeant Wrangham expired at his residence, near Bath, on the 10th of March, aged 58 years. The learned serjeant was the eldest son of a distinguished scholar, Archdeacon Wrangham, and himself took a double first degree at Oxford, in 1826. He was called to the Bar in 1829, but he began public life rather as a politician than a lawyer. He was selected, solely on the ground of his academical distinction, by Lord Audley, as his private secretary at the Foreign Office; and he remained, at Lord Aberdeen's request, in the same office during the Duke of Wellington's administration. For a short time, too, he sat in Parliament for Sudbury. He then returned to practice at the Bar, and went the Northern Circuit; but was soon induced to leave it by his increasing Parliamentary practice, at first chiefly in election petitions, but afterwards, and for many years exclusively, in committees on private bills. The present vacant leadership falls by seniority to the lot of Sir W. Alexander, Q.C., one of the benchers of the Middle Temple.

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#### APPOINTMENTS.

MR. E. J. LLOYD, Q.C., of the Chancery Bar, has been appointed Judge of the County Court of Bristol, in the place of Mr. Willes,

deceased. Mr. W. Spooner, of the Common Law Bar, has been appointed Judge of the County Court of Staffordshire, in the room of Sir W. B. Riddell, Bart., removed to the Whitechapel County Court, in the room of Mr. Serjeant Manning, resigned.

Mr. Selfe, Senior Magistrate of the Thames Police Court, has been appointed to the Westminster Court, in the place of Mr. Paynter, resigned; and Mr. Partridge, stipendiary Magistrate at Wolverhampton, has been appointed to succeed Mr. Selfe.

Mr. G. S. Venables, of the Common Law Bar, has been appointed Queen's Counsel.

Sir William J. Alexander, Bart., Q.C., has been appointed Attorney-General to the Prince of Wales, and also one of the Council of his Royal Highness.

Mr. Keene, of the Chancery Bar, has been appointed Deputy-Registrar of Appeals of the Court of Chancery sitting in Bankruptcy, during the absence, on account of illness, of Mr. Vizard.

Mr. W. P. Murray, of the Equity Bar, has been appointed Registrar of the District Court of Bankruptcy, at Manchester.

Mr. John Bullar and Mr. C. Davidson have been appointed Examiners of Titles under the Land Transfer Act.

The Hon. Evelyn Ashley has been appointed Treasurer of the County Court of Dorset, in the room of Edwin Nicholett, deceased.

Mr. Thomas Goodman, of the firm of Lowless, Nelson, and Goodman, has been appointed Deputy Clerk of Assize for the Norfolk Circuit, in the place of the late Mr. Alexander Edgell; and Mr. William Collisson has been appointed Associate to the Circuit, vacant by the promotion of Mr. Goodman.

Mr. E. W. Williamson has been elected Secretary to the Law Institution, in the room of Mr. Maugham, deceased.

**IRELAND.**—Mr. James Robinson, Q.C., has been appointed to the Chairmanship of the County Tyrone; Mr. Francis Brady, Q.C., to the Chairmanship of the County Roscommon; and Mr. B. C. Lloyd to that of King's County.

**AFRICA.**—William Hackett, Esq., has been appointed Chief Justice of the Supreme Court of her Majesty's Forts and Settlements, and Assessor to the Native Chiefs within the Protected Territories on the Gold Coast; and Thomas Lewis Ingram, Esq., to be her Majesty's Advocate and Police Magistrate at the Gambia.

**BRITISH GUIANA.**—Joseph Beaumont, Esq., has been appointed Chief Justice for the colony of British Guiana, in the place of Sir W. Arrindell, C.B.

**BRITISH KAFFRARIA.**—Thomas Henry Giddy, Esq., has been appointed Master of the Supreme Court of British Kaffraria.

**INDIA.**—Mr. George Campbell, of the Bengal Civil Service, has been appointed a Judge of the High Court of Calcutta; Mr. W. Holloway, Puisne Judge of the High Court of Judicature at Madras; Mr. J. G. Thompson, Civil and Sessions Judge of Tellicherry; Mr. J. W. Dalrymple, Civil and Sessions Judge of Purneah; Mr. C. F. Montresor, Magistrate of the twenty-four Purgunnahs, and Super-

intendent of the Allipore Gaol ; Mr. F. B. Simpson, Magistrate and Collector of Purneah ; Mr. A. Smith, Magistrate and Deputy Collector of Dinagepore ; Mr. W. H. Henderson, Magistrate and Collector of Mymensing ; Mr. J. Beames, Joint Magistrate and Deputy Collector of Purneah ; Mr. J. D. Gordon, Magistrate and Collector of Maldah ; Mr. W. J. Herschell, and Mr. C. E. Lance, Magistrates and Collectors of Monghyr ; Mr. C. P. Hobhouse, Civil and Sessions Judge of the twenty-four Pergunnahs ; Mr. J. D. Mayne, Assistant Secretary to the Government of Madras, in the Legislative Department ; Mr. H. B. Thompson, Queen's Puisne Judge at Ceylon ; Mr. R. F. Morgan, Queen's Advocate at Ceylon ; Mr. Lawson, confirmed in the Office of District Judge of Colombo ; Mr. M. B. Thornhill, Judge and Sessions Judge of Jounpore ; Mr. H. P. Fane, Judge and Sessions Judge of Mirzapore ; Mr. H. E. Perkins, Judge, and to Preside over the Small Cause Court at Hoshyarpore ; Mr. M. J. M. S. Stewart, Collector and Magistrate of North Canara, Bombay ; Mr. S. St. J. Gordon, Collector and Magistrate of Tanua Presidency ; Mr. N. W. Oliver, Senior Magistrate, and Mr. H. E. Leeke, Acting Second Magistrate, for the Town and Island of Bombay ; Mr. C. E. Bernard, Settlement Officer of Wurdah District ; Mr. D. J. McNeile, Joint Magistrate and Deputy Collector of Jessore ; Mr. V. T. Taylor, Joint Magistrate and Deputy Collector of Rungpore ; Mr. J. S. Drummond, Joint Magistrate and Deputy Collector of Behar ; Mr. H. R. Madocks, Joint Magistrate and Deputy Collector of Nuddea ; Mr. W. Heysham, Deputy Magistrate and Deputy Collector of the twenty-four Pergunnahs, to be also Deputy Collector of Calcutta ; and Mr. F. L. Beaufort to be Civil and Sessional Judge of the twenty-four Pergunnahs.

Mr. J. Bruce Norton has been appointed Advocate General of Madras.

NATAL.—Philip Allen, Esq., has been appointed Resident Magistrate for the colony of Natal.

### BAR EXAMINATIONS.

THE Council of Legal Education have approved the following rules for the public examination of the students :—

As an inducement to students to propose themselves for examination, studentships shall be founded of fifty guineas per annum each, to continue for a period of three years, and one such studentship shall be conferred on the most distinguished student at each public examination ; and, further, the examiners shall select and certify the names of three other students who shall have passed the next best examinations ; and the Inns of Court to which such students belong may, if desired, dispense with any terms, not exceeding two, that may remain to be kept by such students previously to their being called to the Bar. Provided that the examiners shall not be obliged to confer or grant any studentship or certificate, un-



less they shall be of opinion that the examination of the students they select has been such as entitles them thereto. At every call to the Bar, those students who have passed a public examination, and either obtained a studentship or a certificate of honour, shall take rank in seniority over all other students who shall be called on the same day. No students shall be eligible to be called to the Bar who shall not either have attended during one whole year the lectures of two of the readers, or have satisfactorily passed a public examination.

The examination will be held in Trinity term next, to which a student of any of the Inns of Court, who is desirous of becoming a candidate for a studentship or honours, or of obtaining a certificate of fitness for being called to the Bar, will be admissible.

Each student proposing to submit himself for examination will be required to enter his name at the treasurer's office of the Inn of Court to which he belongs, on or before Tuesday, May 12, next; and he will further be required to state in writing whether his object in offering himself for examination is to compete for a studentship, or other honourable distinction, or whether he is merely desirous of obtaining a certificate preliminary to a call of the Bar.

The examination will commence on Tuesday, May 19, next, and will be continued on the Wednesday and Thursday following. It will take place in the benchers' reading room, at Lincoln's Inn, and the doors will be closed ten minutes after the time appointed for the commencement of the examination.

The examination by printed questions will be conducted in the following order:—

Tuesday morning, May 19, at half-past nine, on Constitutional Law and Legal History; in the afternoon, at half-past one, on Equity.

Wednesday morning, May 20, at half-past nine, on Common Law; in the afternoon, at half-past one, on the Law of Real Property, &c.

Thursday morning, May 21, at half-past nine, on Jurisprudence and the Civil Law; in the afternoon, at half-past one, a paper will be given to the students, including questions bearing upon all the foregoing subjects of examination.

The oral examination will be conducted in the same order, during the same hours, and on the same subjects, as those already marked out for the examination by printed questions, except that on Thursday afternoon there will be no oral examination.

The oral examination of each student will be conducted apart from the other students, and the character of that examination will vary according as the student is a candidate for honours or a studentship, or desires simply to obtain a certificate.

The oral examination and printed questions will be founded on the books below mentioned, regard being had, however, to the particular object with a view to which the student presents himself for examination.

In determining the question whether a student has passed the examination in such a manner as to entitle him to be called to the Bar, the examiners will principally have regard to the general knowledge of law and jurisprudence which he has displayed. A student may present himself at any number of examinations until he shall have obtained a certificate. Any student who shall obtain a certificate may present himself a second time for examination as a candidate for the studentship, but only at one of the three examinations immediately succeeding that at which he shall have obtained such certificate, provided that if any student so presenting himself shall not succeed in obtaining the studentship his name shall not appear in the list. Students who have kept more than eleven terms shall not be admitted to an examination for the studentship.

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## EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

*Hilary Term, 1863.*

At the examination of Candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—

Mr. Cartmell Harrison, aged 21; Mr. James Huntley John, aged 24; Mr. A. B. D. Sword, aged 21; Mr. John Woodcock, aged 21; Mr. Albert R. Rollit, aged 21.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—

To Mr. Harrison, the prize of the Honourable Society of Clifford's Inn; to Mr. John, the prize of the Honourable Society of Clement's Inn; to Mr. Sword, Mr. Woodcock, and Mr. Rollit, each one of the prizes of the Incorporated Law Society.

The examiners have also certified that the following candidates, whose names are placed in alphabetical order, passed examinations which entitled them to commendation:—

Thomas Beaumont, aged 21; Henry Cadman, aged 21; Thomas D. Goodman, aged 23; Robert W. Griffith, B.A., aged 25; Robert F. Loosemore, aged 22; John Henry Waeick, aged 22; James Webber, Junr., aged 24; and Frederick A. Wilcox, aged 25.

The Council accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examinations were highly satisfactory, and would have entitled them to prizes or certificates of merit if they had been under the age of 26:—

Joseph F. Swann, aged 29; Richard Austen Dale, aged 27; Thomas Goffey, aged 28; Alfred T. Cox, aged 31.

The number of candidates examined was 106; of these ninety-eight were passed, and eight postponed.



## Necrology.

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### *January.*

- 2nd. MURRAY, RICHARD HENRY, Esq., Barrister, aged 26.  
 12th. BURNS, SIR ROBERT EASTON, Puisne Judge of the Queen's Bench, Upper Canada.  
 25th. VIVEASH, ORIEL, Esq., Barrister, aged 68.  
 30th. ROBINSON, SIR JOHN BEVERLEY, Bart., B.C., late President of the Court of Appeal, and formerly Chief Justice of Upper Canada.  
 31st. NICHOLETTS, EDWIN, Esq., Solicitor, and Treasurer of County Courts.

### *February.*

- 2nd. WILLES, WILLIAM HENRY, Esq., Judge of the Bristol County Court, aged 40.  
 3rd. FRANCIS JOHN, Esq., Solicitor, aged 75.  
 3rd. NEWBON, JAMES SHELTON, Esq., Solicitor, aged 56.  
 6th. FISHER, FRANCIS, Esq., Barrister, aged 53.  
 6th. HUNT, WILLIAM, Esq., Solicitor, aged 51.  
 7th. GURNEY, WILLIAM CORYNDEN, Esq., Barrister, aged 32.  
 14th. RENNALLS, WILLIAM RODEN, Esq., formerly Judge of the Court of Admiralty, in Jamaica, aged 73.  
 21st. CHITTY, THOMAS, Esq., Barrister, aged 47.  
 22nd. EDGELL, ALEXANDER, Esq., Solicitor.  
 23rd. WATSON, ROBERT WILLIAM, Esq., Solicitor.  
 28th. KNAPP, CHARLES, Esq., Barrister, aged 48.

### *March.*

- 2nd. O'MEAGHER, WILLIAM, Esq., Barrister.  
 8th. MACKENZIE, WILLIAM, Esq., Solicitor, aged 56.  
 9th. WARNER, ISAAC, Esq., Solicitor, aged 48.  
 10th. WRANGHAM, DIGBY CAYLEY, Esq., Serjeant-at-Law, aged 58.  
 11th. CLARE, AMBROSE, Esq., Solicitor.  
 11th. ROBSON, JAMES PICKERING, Esq., Solicitor, aged 48.  
 14th. KENNEDY, REYNOLDS, Esq., Solicitor, aged 23.

19th. WHITE, J. MEADOWS, Esq., Solicitor, aged 64.

20th. ROPER, SIR HENRY, formerly Chief Justice of Bombay,  
aged 63.

24th. LOW, ARCHIBALD, Esq., Solicitor, aged 72.

27th. BROOKSBANK, James, Esq., Barrister, aged 46.

*April.*

3rd. LAKE, HENRY, Esq., Solicitor.

3rd. STRANG, ROBERT, Esq., Solicitor.

19th. SWANSTON, CLEMENT T., Esq., Q.C., aged 80.

20th. PAYNTER, THOMAS G., Esq., late one of Metropolitan Police  
Magistrates, aged 81.



## List of New Publications.

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*Baker*—The Laws relating to Burials ; with Notes, Forms, and Practical Instruction. By J. Baker, Esq., Barrister. Third Edition. Including the Statutes passed during the last Session of Parliament, and the Scotch and Irish Acts. 12mo., 7s. 6d. cloth.

*Bateman*—The General Highway Acts. Second Edition. By W. N. Welsby, Esq. 12mo., 9s. cloth.

*Chitty*—A Treatise on the Law of Contracts, and upon the Defences to Actions thereon. Seventh Edition. By J. A. Russell, Esq., Barrister. Royal 8vo., 32s. cloth.

*Coote and Tristram*—The Practice of the Court of Probate in Common Form Business ; also a Treatise on the Practice of the Court in Contentious Business. By H. C. Coote, Proctor, and Dr. T. H. Tristram. Fourth Edition. 8vo., 21s. cloth.

*Day*—The Common Law Procedure Acts and other Statutes relating to the Practice of the Superior Courts of Common Law, and the Rules of Court ; with Notes. By J. C. F. S. Day, Esq., Barrister. Second Edition. Post 8vo., 15s. cloth.

*Edwards*—Shall we Register Title ? or, the Objections to Land and Title Registry Stated and Answered. By T. Edwards, Esq., Barrister. 12mo., 4s. 6d. cloth.

*Fisher*—A Digest of all the Reported Decisions in the House of Lords, Privy Council, Common Law, Equity, Divorce, Probate, Admiralty, Bankruptcy, and Ecclesiastical Courts, with a Selection from the Irish and Scotch Reports, References to the Statutes passed, and Rules and Orders of Court promulgated ; and a Collection of Cases overruled and impeached from Hilary Term, 1862, to Hilary Term, 1863. By R. A. Fisher, Esq., Barrister-at-Law. Cloth, 11s.

*Hawkins*—A concise Treatise on the Construction of Wills. By F. V. Hawkins, Esq., Barrister. 8vo., 10s. 6d. cloth.

*Lewis*—Principles of Conveyancing Explained and Illustrated by concise Precedents ; with an Appendix on the Effect of the Transfer of Land Act. By H. Lewis, Esq., Barrister. 8vo., 18s. cloth.

*Lumley*—The Law of Parochial Assessments Explained in a practical Commentary. With an Appendix containing the Modern Statutes relating to Rating, and the Union Assessment Committee Act, 1862. By W. G. Lumley, Esq., Barrister. 12mo., 6s. 6d. cloth.

*Maine*—Ancient Law : its connexion with Early History of Society, &c. By H. S. Maine, Esq., Barrister. Second Edition. 8vo., 12s. cloth.

*Rouse*—Practical Man ; giving 400 carefully prepared Forms in Legal Matters, and a complete Collection of Tables and Rules applicable to the Management of Estates, the Calculations of all

values dependent on Lives, Reversions, &c. By Rolla Rouse, Esq., Barrister. Tenth Edition. Oblong 12mo., 9s. cloth.

*Seton*—Forms of Decrees in Equity, &c., with Practical Notes. Third Edition. By W. H. Harrison and R. H. Leach, Esquires, Barristers. 2 vols. Vol. II., royal 8vo., 30s. cloth; Vol. II., part 2, royal 8vo., 14s. cloth.

*Shelford*—The Law of Joint-Stock Companies; containing the Companies Act, 1862, and the Acts incorporated therewith. With copious Notes of cases relative to Joint-Stock Companies, the Rules and Forms of the Court of Chancery in proceedings under the above Act, and Forms and Articles of Association. By L. Shelford, Esq., Barrister. 12mo., 15s. cloth.

*Simmons*—Remarks on the Constitution and Practice of Courts Martial; with a Summary of the Law of Evidence as connected therewith, and some notice of the Criminal Law of England with reference to the Trial of Civil Offences. By Captain T. T. Simmons, R.A. Fifth Edition. 8vo., 14s. cloth.

*Smith*—An Elementary View of the Practice of Conveyancing in Solicitors' Offices; with an Outline of the Proceedings under the Transfer of Land and Declaration of Title Acts, 1862. For the use of Articled Clerks. By E. Smith, Solicitor. Post 8vo., 6s. cloth.

*St. Leonards*—A Handy Book on Property Law, in a Series of Letters. Seventh Edition. Re-issued with a Portrait of the Author, and the addition of a Letter on the New Laws for obtaining an Indefeasible Title. By Lord St. Leonards. 12mo., 3s. 6d. cloth.

*Stephen*—Questions for Law Students on the Fifth Edition of Mr. Serjeant Stephen's Commentaries on the Laws of England. By T. Stephen, Esq., Barrister. 8vo., 10s. 6d., cloth.

*Stone*—The Practice of Petty Sessions; with the Statutes, a List of Summary Convictions, and an Appendix of Forms. Seventh Edition. By T. Bell and L. W. Cave, Esquires, Barristers. With a Supplement, containing the Statutes and Decisions to 1863. By L. W. Cave, Esq. 12mo., 18s. cloth. Supplement, separately, 3s. sewed.

*Urlin and Key*—The Transfer of Land and Declaration of Title Acts, 1862. Illustrated by the Practice and Decisions under the Analogous Irish Acts; with Notes, General Orders, Forms, &c. By R. D. Urlin and T. Key, Esquires, Barristers. 12mo., 10s. cloth.

*Wheaton*—Elements of International Law. Second Annotated Edition. By W. B. Lawrence. Royal 8vo., 31s. 6d. cloth.

*Woodfall*—Law of Landlord and Tenant. Eighth Edition. By W. R. Cole, Esq., Barrister. Royal 8vo., 35s. cloth.

THE  
**Law Magazine and Law Review:**  
OR  
QUARTERLY JOURNAL OF JURISPRUDENCE.

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No. XXX.

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ART. I.—THE LAW OF LIBEL, AS APPLIED TO  
PUBLIC DISCUSSION.

*Foster and Finlason's Reports.* Vol. II., containing *Turnbull versus Bird*; and *Paris versus Levy*. Vol. III., Part 3, containing *Campbell versus Spottiswoode*.

**PUBLIC** opinion is the very life-blood of a free State; and it exists and circulates by freedom of discussion. The free expression of opinion is, in fact, the very soul of freedom; it is that which is the essential distinction of a free country; its presence is liberty, its absence is slavery; the want of it produces the stagnation of mind, and prostration of thought, which mark the moral death of a nation, and are the sure forerunners or the worst results of tyranny. On the other hand, freedom of discussion, as it is a well-spring of life to a nation, is at once the essence of the first blessing, freedom; so it is at once the source and the security of every other. It is by means of this that all the institutions of a free country are brought and kept in harmony with public opinion. This harmony is, in a free country, of the first necessity. Thus Burke declared the true end of the Legislature to be to follow the general sense of the community (*Works*, vol. i. p. 216).

To effect this harmony, in a political sense, is the object of representative institutions and a free Parliament. To effect it as regards the administration of justice, is the object of trial by jury. It is the object, indeed, of all our popular institutions, but, above all, by freedom of discussion and the force of public opinion. There are two great means or forms of the expression of opinion; it may be by oral addresses or by public writings. Before the invention of printing, it was, of course, only in the former, and it was in the face of public assemblies that the right of free discussion was asserted—a noisy and exciting form of its exercise, not favourable to calm consideration, appealing rather to the feeling than the intellect, and apt to lead, in fact, to displays of physical rather than to intellectual force. Moreover, after all, public speaking is but a laborious and limited means for the diffusion of ideas through a whole nation, and no wonder that when their circulation was confined thereto they travelled somewhat slowly. Printing infinitely enlarged the field for the diffusion of ideas and extended the area of public discussion.

The invention of printing, of course, threw the expression of public opinion into the peaceful form of an appeal to intelligence and public opinion. The three centuries which have elapsed since that great event might, perhaps, be divided into the age of the book, of the pamphlet, and of the newspaper. The comparatively cumbrous form of the book prevailed in the 16th century; the lighter pamphlet succeeded in the 17th; the newspaper—the last and greatest development of divided intelligence—was the product of the 18th century. The result of its rise was an immediate increase in the publication of books. Mr. Buckle observes that in England the marked increase in the number of books took place during the latter part of the 18th century, and particularly after 1756. He adds, that between 1753 and 1792 the circulation of newspapers more than doubled (*History of Civilization*, vol. i. p. 399, note 239). Since that era the discussion of public matters has fallen to the newspaper press (including all

periodical journalism), whose very object and vocation is the expression of public opinion on public men, and public measures, and public matters in general.

The gifted author of the *History of Civilization* ascribes all improvements and the abolition of all abuses to the progress of public opinion by the influence of the press. Statesmen, he says, are only the creatures of the age, not its creators. "These measures are the results of social progress, not the cause of it."

"No great political improvement, no great reform, either legislative or executive, has ever been originated in any country by its rulers. The first suggesters of such steps have invariably been bold and able thinkers, who have discerned the abuse, denounced it, and pointed out how it is to be remedied."—*Hist. Civiliz.*, vol. i. p. 28.

To denounce public vices or abuses without denouncing those who practise them, uphold them, or profit by them, and have an interest in maintaining them, is practically impossible, and there is a natural and intimate association between the conduct and the character of public men, often an equally close connection between their action and opinion. Hence it is, that from the first rise of the newspaper press, to which has gradually and naturally fallen the expression of public opinion, it has been in the habit of assailing public men. Mr. Buckle in his *History of Civilization* mentions it as an indication of the rising independence of the press that in 1762 (just a century ago) "we find the first instance of a popular writer attacking public men by name." And then began what he calls the "'feud' between literature and rank," which, he says, "we continued to this day," (Vol. i. p. 397) but as to which we say nothing.

So far from persons and their actions being excluded from the scope of free discussion, Burke actually adduces, as a bad trait in the character of bad citizens, an indifference to the merits or demerits of public men. "They see," he says, "no merit in the good, and no fault in the vicious management

of public affairs. They see no merit or demerit in any man, or any action, or any political principle." (*Reflections on French Revolution.*) Here this great writer and great teacher of political wisdom connects together public men, their principles, their actions, as equally fit subjects of public discussion; for he denounces as evil, and as a mark of bad citizen, an indifference or disregard thereto. And in another part of the same immortal work he explains with philosophical acumen the *rationale* of such restraints on public men, or on the people themselves, as law and public opinion each in their respective spheres supply. He says:—

"Society requires not only that the passions of individuals should be subjected, but that even in the mass and body, as well as in the individuals, the inclinations of men should be frequently thwarted, their will controlled, and their passions brought into subjection. This can only be done by a power out of themselves, and not, in the exercise of its functions, subject to that will, and to those passions which it is its office to bridle and to restrain."—*Ibid.*

In its highest human sense this, of course, refers to law: but then, as all lawyers know, the province of law is comparatively restricted: and there is a vast field of public action in which the law is powerless, and the only restraint is public opinion.

And in the same spirit Burke rather encourages the denunciation of false pretexts of right under which all wrongs are committed, rather than the general abuse of the institutions under cover and under colour of which they are perpetrated. "History," he says, "consists for the most part of the miseries brought upon the world by pride, hypocrisy, ungoverned zeal, which shake the public with their troublous storms. These vices are the causes of those storms. Religion, morals, laws, privileges, rights of men, are the pretexts. The pretexts are always found in some specious appearances of real good. You would not secure men by rooting out of the mind the principles to which these



fraudulent pretexts apply? As these are the pretexts, so the ordinary actors and instruments in great public evils are magistrates, senates, national assemblies, judges, ministers. You would not cure the evil by resolving that there should be no more monarchs, nor ministers of state, nor magistrates. A certain quantum of power must always exist in the community, &c." (*Reflections, &c.*) The drift of his argument is, attack the particular evils, or abuses, or faults, or vices of which you complain in public men, and do not confound with them the institutions themselves. In this sense, public discussion, as to public men and their actions, is, it is obvious, a great safety-valve for the State—a conservative and protective power, the tendency of which is to denounce the errors or vices of our public men, and the abuses of our public institutions, and so to uphold the institutions themselves.

The two forms of free discussion, in the press and at public meetings, have always been united. The Government once attempted to suppress it by enacting a series of laws which, says Mr. Buckle, were intended to put an end to the free discussion of political questions and stifle the spirit of inquiry. These laws, he said, if the energy of the nation had not prevented their being properly enforced, would have destroyed every vestige of popular liberty, or else have provoked a general rebellion. Lord Campbell (*Lives of the Chancellors*, vol. vi. p. 449) says that if the laws passed in 1794 had been enforced, the only chance of escaping servitude would have been revolution; and Lord Brougham calls it "an escape from proscription and from arbitrary power." Now these laws were passed both against the press and against public meetings.

There is, it will be observed, a close connexion between the right of public discussion and the freedom of the press. They are, in short, two forms of exercise of the same right, viz., the right of public discussion—one in the form of speech, the other in the form of print. The latter is infinitely

the more important, as it is capable of a greater degree of diffusion and an infinitely wider range of operation. The great author we have already quoted thus alludes to the latter:—

“We may form some idea of the magnitude of the crisis by considering the steps which were actually taken against the two most important of all our institutions, viz., the freedom of the public press, and the right of assembling in meetings for the purpose of public discussion. These are in a public point of view the two most striking peculiarities which distinguish us from every other European people. So long as they are preserved intact, and so long as they are fearlessly and frequently employed, there will always be ample protection against those encroachments on the part of Government, which cannot be too jealously watched, and to which the freest country is liable. To this it may be added that these institutions possess other advantages of the highest order. By encouraging political discussion they increase the amount of intellect brought to bear upon the political business of the country. They cause large classes of men to exercise faculties which would otherwise lie dormant, &c.”—*Hist. Civiliz.*, vol. i. p. 443.

It is obvious that this great right of public discussion, whether oral or written, cannot be restricted to the mere discussion of abstract questions of principle or of policy, but must, of necessity, embrace all that comes within the sphere of public life—the acts, the words, the conduct of public men, and even in some cases their private character, in so far as it tends to throw a light upon their fitness for public offices or their exercise of public functions. Nor, again, can the right be restricted to the mere expression of opinion upon undoubted and admitted facts; or mere criticism upon published works; or the mere character of public acts in regard to their own inherent nature or quality apart from extrinsic circumstances which might, if known, give them another character or quality from that which would be apparent on the face of the matter. There must be power to draw inferences “of fact,” and as there is always more or less

of opinion in the drawing of inferences, and persons may as honestly differ in regard to inferences or opinions, it may often happen that a public writer may honestly draw erroneous inferences, that is, inferences which others would deem erroneous, and even unfair ; just as it may often happen that he may express opinions on undoubted facts which others may deem erroneous or even most uncharitable and unjust. The right of free discussion must, it is obvious, embrace, to some extent, disputed facts as well as disputed opinions. Indeed, all opinions, save such as are purely abstract, and bearing little, if at all, on the discussion of public events, depend more or less upon the facts. Alter the facts a little, and you necessarily alter the opinion ; alter, therefore, your view of the facts, and you necessarily alter your opinion of the matter. To preclude a public writer or speaker, therefore, from discussing facts, would be to exclude from this right of public discussion its most important province, and that on which all else must depend ; and to compel him to discuss matters on a basis of supposed facts conceded by those who take a different view, would be, in truth, in many cases, to prevent all discussion at all, because upon that very statement of facts the whole difference of opinion may ultimately turn.

It is, again, obvious, that this right of public discussion, oral or written, must, in a vast multitude of cases, probably the great majority, more or less affect or involve questions of personal character. Questions of character must of necessity be personal, whether they regard matters public or private in their nature. And matters even private in their nature may affect a man's public character ; as matters purely public may and must affect his personal character, in so far as they regard the character and quality of his own public acts. And it is obvious that there are a vast variety of cases in which it is not possible to discuss a matter of public interest without affecting personal character. The fitness of a man for his office, for instance, may involve many matters of character. The legal justice of a verdict of acquittal upon a serious

charge may be of immense public interest, and as fit to be discussed as a verdict of guilty, and of course cannot possibly be discussed without involving indirectly the question of the guilt or innocence of the accused. Even the discussion of a published work must more or less affect the personal character of its author; for, to say of a man that he has written a work immodest or immoral, is to reflect strongly on his personal character. It is an indirect reflection upon it, it is true, but not the less a reflection.

So again, and above all, as to that most important and most doubtful portion of the field for further discussion, and as to which the most difficult questions arise—the public acts of public men. It is manifest that these are, above all other matters, proper subjects for public discussion, more especially in that vast range of cases in which there is no remedy for miscarriage, or even for misconduct, short of that which the law deems criminal or punishable. There are, it is well known, many classes of cases, indeed, including most offices or functions of a public nature, and especially such as are judicial or municipal, in which there is no remedy, but that which is penal, and generally in the way of removal. The law deems, in these cases, the free and unfettered discharge of the public duties so important, that it will not allow the party to be harassed by action, and confers entire immunity except on proof of wilful delinquency.

It is obvious that these are precisely the class of cases in which freedom of public discussion is most important, both because there may be a great degree of misconduct which may not be deemed legal or criminal; and because there may be a great deal even of such misconduct without sufficient legal proof; or the means, or power, or disposition in the party grieved, to promote legal proceedings. And every day shows that, strictly within the scope of a public officer's jurisdiction or lawful power, there may be, whether with or without bad motive, a vast deal of injustice, oppression, and abuse. It is just here that public discussion is most important,

because practically there is no other remedy. And, indeed, this is the proper and peculiar, though not, perhaps, the exclusive field for public discussion, as to cases in which either there is not, or from circumstances there cannot be, or, at all events, in the particular case will not be, any legal remedy. Thus it is that public discussion comes, so to speak, in aid of the law, and is not to be viewed as opposed to, but rather co-operating with legal justice.

From reasons of public policy the law, in many circumstances, can give no direct redress. Thus, there are a large number of cases, such as most summary convictions, in which there is, so far as the case turns on the facts, no appeal; and thus men practically may be wrongly and unjustly fined and imprisoned without redress. There are reasons of public policy for which the law allows great latitude to public officers, and often allows magistrates to be absolute if not arbitrary. The law, however, from reasons of the like public policy, allows freedom of discussion in these cases, and thus recognises the right of public discussion as a valuable aid to public justice, for the sake of their common object, the public interest. It allows the public officer full freedom, unfettered by dread of action, in the exercise of his functions; so it allows the public writer full freedom, unfettered by that dread, in the exercise of his functions. In each case there is a privilege in the true sense of the term—that is, an immunity from legal liability in the honest exercise of a public right. Thus the legal right of the public officer is to discharge his functions according to his own opinion and judgment, however he may err therein. It is the right of the public writer to comment freely on these acts, however he may err therein; that is, each is protected from liability for mere error within the scope of his proper power and province. So far we might reason safely, *à priori*, from the admitted existence of a right of free discussion on public matters. And we might even go a step farther, and say, that this right must of necessity, as it clearly must in many cases, extend to the grounds, the reasons,

or the causes of a public act; so in some cases, even to the object, the motive, or the animus. For in many cases the whole character of an act depends entirely or mainly on its object, whether the aim of a movement be to reject a ministry or displace a policy: whether the motive or real intention of an act was to do right or to destroy an adversary; whether, in short, a public officer has acted honestly, is very often vital to the inquiry.

It is obvious that in these classes and cases (which are those in which the exercise of the right of free discussion of course raises questions of most difficulty), personal character is more nearly and directly affected than in any other. But it is equally obvious that it is only a question of degree; for, as we have seen, there is an implied and indirect reflection on a man's character in saying that he has written books of an immodest or immoral tendency, and in that kind of case it would very little, if at all, heighten the imputation to say he did so from a bad motive, seeing that the act itself was so bad; or, again, as it is a principle of law that every reader must be taken to contemplate the natural result of his own act, it would be safe to infer in such a case that the publication was from a pleasure in diffusing bad ideas, or for the sake of profit, or what not. When the act itself is morally bad, and there is no dispute about the fact—there is little scope for reflection upon motive. The question of greatest difficulty as to the right of public discussion, arises where the act *per se* is either indifferent, or even, on the face of it, lawful and right, in the discharge of some public duty, or, at all events, the public exercise of some legal right. The difficulty in these cases arises from the extreme importance of allowing freedom of discussion as to the honesty of the acts of public men; on the other hand, the importance of protecting men from groundless imputations, upon character, while character must necessarily in these cases be closely and directly involved. The problem which the law has to solve in such cases is one, it is obvious, of extreme delicacy and difficulty—the drawing

of a line between freedom and licence; between immunity in discussion and immunity for defamation. Difficult, however, as the problem may be, it must be obvious, even *à priori*, that it would only be solved by a steady adherence to the same principles which govern the law on the subject in cases of less difficulty. The axioms of Euclid form the basis of the most complicated operations in mathematics, and by these combinations solve the most difficult problems. Thus it is that the law develops itself logically from the easy premises of first principles, and, from their happy combination, elucidates the most perplexing legal difficulties.

And thus, reasoning *à priori*, from the admitted exercise of a right of free discussion upon public matters, we might, apart from positive authority, deduce from legal principles and analogies, at once the legal limits of that right, and the existence of a privilege (or immunity from legal liability) in its honest exercise. As regards the first—the legal limits of the right—every public right has its limit, and to define all our rights is the great province of law. The right of free discussion, great and valuable as it is, has its legal limits, and they are in substance the same whether the discussion be oral or written—at public meetings or in the public press. There is a great legal principle that no right is ever allowed to go beyond the occasion, or the object or cause for which it is allowed. Now the object or cause for which the law allows of public discussion, is the public interest in regard to public matters. Hence it is obvious there can be no right of public discussion as to matters not public; nor any right of public discussion (in the only sense in which the phrase “right” has any real meaning, *i.e.*, as excusing defamation)—to any extent beyond what is necessary for the discussion of what is public.

All law is a balance of evils and advantages, and even our natural rights are to some extent sacrificed for the sake of society. Thus it is with the sacred right of personal liberty; and one man may in the exercise of the public right of prosecution, without legal liability, cause another to be arrested

without any reasonable or probable cause, so that it is not a wilfully wrongful act. So it is as to the security of personal character—it is so far sacrificed by the law to what the law deems of higher importance—that a man cannot resort to law for its vindication against defamation when it has arisen in the exercise of the public right of free discussion. It is a general principle that an act, otherwise unlawful and injurious, is excused when it is in the exercise of a public right the law recognises and encourages. Thus it is with the right of prosecution: thus it is with the right of free discussion. An injury done in the exercise of those rights—not wilfully—would not, we should say, *à priori*, be deemed actionable in law.

These instances are not inconsistencies, nor even exceptions, in our law. They are rather illustrations of a general principle which pervades it. The law (or the government in general, of which it is only a part), which is framed for the general welfare of the community, does not undertake to provide remedial or vindictory measures in all cases of wrong or injury, but only so far as is deemed by the law and constitution of the country necessary for the good of society. On the contrary, in a free state, the object of law and government is, as much as possible, to allow of individual liberty, and only to fetter or confine it so far as is essential or desirable for the existence or general benefit of society. Hence, so far from its being, *à priori*, to be laid down that the expression of opinion on public matters, even when defamatory, *i.e.*, prejudicial to an individual, should be legally punishable, *primâ facie*, or unless in cases of wilful injury, the very reverse would be the presumption, and the injured individual would be simply left to the same or similar means for his vindication. For this would be an analogy with the ordinary principle of our law, which is to grant immunity for any casual injury to an individual in the exercise of a public right, in the free exercise of which the public has an interest.

But it is an invariable rule that the law never allows one



legal right to encroach upon another, except so far as may be necessary. Thus it is as regards liberty; and so a private person may not give another into custody, save in cases of felony, upon just and reasonable ground of suspicion (or in one or two exceptional cases of actual necessity, as, to prevent an impending breach of the peace, or the like), because he may have recourse to a constable or a magistrate, who have a larger measure of immunity. So as to the right of prosecution,—a man being only protected by it within the limit of what relates to or arises out of it, and not as to matters quite extraneous; as, for instance, a charge of adultery, in the case of a charge of felony. From this great principle it would follow that the right of free discussion could only extend to matters which are fit subjects for public discussion, and such matters as may fairly arise out of what already is so. The ratio for determining this must of course vary in each class of cases, but the principle is the same. Thus, in a case of a book or other publication, it must be what arises fairly out of the publication itself; in the case of a public act, the nature of the act and whatever may fairly arise out of the surrounding circumstances known or admitted about it.

There being, it is obvious, some ground for such immunity in the right of public discussion in general, there are numerous and obvious arguments in support of a peculiar immunity to the press in the discussion of public matters. In the first place, even assuming some degree of honest but erroneous imputation, it is public, and the object of it knows of it, and can at once answer it; whereas, the worst mischief of defamation is when it is secret, and the object of it, not knowing of it, may be fatally injured without being aware of the injury, nor having an opportunity of preventing it.\*

Next, the press itself, the medium of the defamation, presents the most efficient means of refutation—prompt, immediate, and as widely diffused as the defamation itself.

\* See some remarkable observations by Coleridge on secret defamation, *Biog. Lit.* vol. i. p. 192.

Further, the premises on which the imputation is made are almost always—in all cases in which it is protected—put before the public, so that very often it carries with it its own refutation; and, at all events, people have an opportunity of forming their own judgment, and very likely it will be to a great degree left in doubt, if not altogether in favour of the accused. Lastly, if the accused is not afforded a fair opportunity of answering the imputation, it will be evidence of malice, and make the writer liable.

No peculiar immunity, however, is necessary for public writers in newspapers. They only claim the benefit of the same right of public discussion which is allowed to all. And such are the legal limits of the right which suggest themselves, reasoning, *à priori*, from general principles.

But next, such being the limits of the right, there is another legal principle upon which, *à priori*, we might safely infer the existence of a privilege in its honest exercise; that is, its honest exercise within the legal limits of the right as already pointed out. The two questions are quite distinct. Within the strictest limits of the right there may be an exercise of it either honest or dishonest. And there is a great twofold legal principle that the law never allows any exemption of immunity in the dishonest exercise of a public right; and that it always allows such an immunity or privilege in the honest exercise of a right in the free exercise of which the public have an interest. Thus it is in the right of prosecution: within its limits there is no legal liability, however erroneous and injurious, so that it is not wilfully or without any reasonable or rational ground, or with wilful falsehood, so as to show what the law deems evidence of a bad motive.

This is what the law denominates privilege, and confers in every case of the honest exercise of a public right of which it deems the free exercise to be of public interest. The right of publication is one instance, that of free discussion is another; the exercise of any judicial function is another. The very nature of the right of free discussion necessarily

includes it within this principle. For, as we have seen, it is only allowed at all for the sake of securing freedom of discussion, that being of such vital nature in a free State. It is, in fact, the right of free discussion; and, of course, it is of its essence that it should be free. But free it cannot be if hampered, within the limits of the legal right, by the dread of being harassed by action for any honest though erroneous imputation, which in law may amount to defamation. If the law deemed this consistent with the free exercise of a right, it would not protect prosecutors or public officers from it. As it does not deem it consistent with freedom, it protects public writers from it, and does so by what we call privilege.

It would, it is admitted, be a public evil if men were deterred from the fair exercise of the right of free discussion on public matters. But they must be so deterred unless there is a privilege in the discussion of such matters, that is an immunity for honest though erroneous defamation in the course of such discussion, and for criminatory imputations, by way of inference, from public facts, whether acts or words, with all the concurrent circumstances of the case; if not so extravagant and obviously unfounded as to show a reckless and malicious spirit.

If there were no such privilege or immunity there would be a great mischief and a monstrous anomaly. The basis of all such privileges as are allowed is public interest; or, as the judges sometimes express it, "the ordinary exigencies of society." On that broad general principle all privileges are rested: and on that ground privileges in even private matters are allowed; in some cases, in which persons are, it is manifest, less likely to be disinterested or dispassionate than in matters where they are personally not concerned, and the interests of third persons or of the public are affected. It would be unreasonable if in these latter cases there were no protection, and if in every case the sole question for the jury were, "Is this true?" or, "Is it in *your* opinion fair, or well founded?"

It is an entire error to confound privilege, in the sense in which it is used by the law of libel, with *privilegium*. This is

to be misled by a mere resemblance of words arising from the poverty of language. The proper idea of *privilegium* is a special provision for a particular case out of the province of general law. It is in this sense which is adverted to by Burke, when he says, "It is against all genuine principles of jurisprudence to draw a principle from a law made in a special case, and regarding an individual person. *Privilegium non transit in exemplum*" (*Reflections on French Revolution*). But the same great writer uses the word privilege in quite the opposite sense, as associated with public rights and liberties. "We have," he says, "a people inheriting privileges and liberties" (*ibid.*). And again, "We receive, we hold, we transmit our government and our privileges" (*ibid.*). And in this sense, the word is used by our text writers and judges, in the want of any better, (or indeed of any other,) to express an immunity in the exercise of some legal and public right; both the right and the immunity being always grounded on principles of public policy, and on a regard to the public interest or what is called "the reasonable exigencies of society." This is the basis on which it is founded even as regards private matters.

The true nature of privilege, in the legal sense in which it is used in the law of libel, as it is in other departments of our law, is an indulgence or immunity to men in the honest exercise of a right, in the free exercise of which the public have an interest. The distinction is, in the allowance or disallowance of any indulgence or immunity to its honest exercise. There is no such indulgence in the exercise of a mere private right, in the free exercise of which the public has no interest; as the right of property; nor even the right of speech or publication, when no public interest is involved. However honest the error, the man must suffer. It is not so when the public interest is concerned. Thus, to the extent to which that interest is concerned, there is this indulgence and immunity to honest error. Otherwise a free and honest exercise of the right would be fettered by the fear of legal

liability. In such cases the law allows immunity, except in cases of wilful wrong. So it is as to prosecution or actions. So it is as to the right of free discussion.

The true meaning of the word privilege, when used in the law (except in such instances as judges, or jurors, &c.), is not a personal exemption arising from any particular position or relation, but an immunity or protection in the exercise of a private or public right. That is, it is not a right, but as collateral or incidental to the exercise of a right. In other words, it is an excuse or immunity for what would otherwise be legally punishable or actionable. Thus there is no right to publish libels. But there is no libel, that is, no defamation legally punishable, when it is lawfully excusable. In other words, where there is a right, in the exercise of which there is a privilege or excuse to publish defamatory imputations. This is the privilege of protection enjoyed by the public press, in common with the public, in the public discussion of public topics. There is a right of free discussion, and, in the exercise of it, a privilege or excuse for defamation.

If it were not for this privilege, the freedom of discussion would be placed absolutely in the power of some particular class, either the class to which belong the judges, or the jury.

It is necessary that the exercise of the right of free discussion should not be placed absolutely in the power of any class. The institution of trial by jury, coupled with Mr. Fox's Libel Act, secures it absolutely from the power of the Crown or of the aristocracy. The law of privilege alone can secure it from perhaps a worse evil still—the absolute power of the people. The most profound thinkers in every age, from Aristotle downwards to our own time, have warned us against allowing the people absolute power; and Dr. Arnold, as Burke had done before him, while asserting the necessity that the people should be paramount, also asserts that (for that very reason) they should not be absolute; that is, that they shall be subject to some controlling and restraining power. It is

manifest that, save within the comparatively restricted domain of law, this restraint can only be applied by the force of public opinion exerted in the right of free discussion, in which thought and intellect must address and enlighten the mind of the nation.

But, as Burke himself points out, the efficacy of any restraining power depends entirely upon its not being subject absolutely to the control of the very power it is designed to restrain: that is, in this case, the people. If, however, the law of libel placed public writers entirely at the mercy of the jury, then the right of free discussion would be under the absolute control of the people; and the expression of public opinion would be merely the expression of popular opinions. The jury have already by law the power of protecting a public writer by saying what is *not* a libel. If they had also the power of saying always what was a libel, they would be arbitrary. But there is no libel where there is a lawful excuse. There is a lawful excuse in the honest exercise of a public right with a free discussion; and the question of lawful excuse is, in the first instance, a question of lawful excuse for the judge.

Thus a public writer is secured, by this doctrine of privilege or lawful excuse, from being absolutely in the power of the jury or the people. The jury have absolute power to say what is not a libel, but they have not the like absolute power to say what is, for they have not the power of saying what is a lawful excuse. Thus, then, if a public writer attack any popular body, as a jury, or a vestry, or an electoral body, or any popular idol, a demagogue, a public charlatan, a pretender and impostor, he is protected from the popular prejudices and passions, just as surely as he is, in the case of any assault upon aristocratic prejudices or feelings, from the power of the aristocratic classes; and he is safe unless he has made attacks which are so excessive that the judge feels bound to declare that the jury may find he has been legally culpable. All this, however, it will be seen, depends entirely on the law of

privilege, for otherwise, in every case, the whole question would be absolutely for the jury.

To restrict the right of free discussion within the limit of what the jury may deem absolutely "fair" in the sense of the fairness of the censures or strictures themselves, assuming a theme within the scope of the subject-matter of discussion, would be to enslave public opinion, and confine it to the limits of what the jury may happen to approve of. For to expect a jury to be able to draw a line between what they approve of, and what they think fair, as to opinions they disapprove of, is what no one at all acquainted with trial by jury will be so deluded as to dream of. The result would be to measure the right of free discussion on public topics by the mere good pleasure of a portion of the community—very large and very numerous—perhaps representing a numerical majority, but by no means representing the intellect, information, and intelligence of the nation—a class most exposed to passion and prejudice, and (a very large portion of them) to ignorance; and likely to be least disposed to be tolerant to the opinion of a minority. Yet it is the great object of really free institutions to protect a minority from tyranny.

To refer it to the jury whether the comments are fair, would be to place public writers in a far worse position than to deprive them of all protection; and tell them that, fair or unfair, their comments, if criminatory, will be deemed defamatory. For then, at all events, they would be equally contrary on all occasions, and thus, if their energies were deadened by perpetual dread of legal liability, at least they could not be tempted to become servile to the strong influence of the people. But to tell them that they may have an immunity if they manage to hit the popular feeling so far as to get a jury to say their observations are "fair," is to tempt them to pander to the popular feelings, and thus tend to foster the worst vices of the press. It is of the last importance that the press should be independent of all power save that of the law, and of all popular influences which may

prevent its performing its highest function—the exposure of popular delusions and the false pretences of popular impostors—and, above all, the vices of the people themselves, which have no censors but the press.

And this would be pre-eminently the case when it was his duty to impugn popular decisions, as, for example, to impeach the verdict of a jury, or the vote of a public body. Such acts of the people or of popular bodies may be grave offences against honesty and decency, and there is no other remedy than the expression of public opinion in the press. In their political or their judicial functions, the people are not responsible, save to public opinion. The verdict of a jury may be atrocious; but the writ of attaint is gone, and there is no legal remedy. An atrocious criminal may escape through popular prejudices or passions; such cases have occurred within living memory, just as within living memory judicial murders have been perpetrated. The days for the latter are gone, and juries are not so likely to sin in the way of rash convictions, as weak or iniquitous acquittals. Anyhow, it may be that popular bodies or popular favourites may be great offenders at the bar of public opinion. They can only be arraigned and accused in the press.

And if under the law of libel the juries were to be then sole judges, they would be judged by those they had accused, or by those who had the most perfect sympathy with them, and, of course, would be certain to be condemned. Thus, the liberty of the press would be destroyed where it is most important to preserve it, and the worst of all tyrannies, a popular tyranny, would be established, and established by means of a jury!

Yet it is obvious that unless there is a privilege (that is, an excuse for defamation in the exercise of honest discussion, and immunity from legal liability, except in the cases of wilful wrong and malice), this must be the result, for there must be some limit to the right of free discussion and the privilege of defamation in the exercise of it; and that limit, in some form or



other, must be with the jury; and if not on the question of malice, it must be on the question of fairness. And that is a question not of judgment or evidence, as is that of malice, on which the Court can correct any perverse or wrongful verdict of the jury; but a question of mere arbitrary opinion, on which the jury would necessarily be absolute as well as arbitrary, and thus the expression of public opinion would be entirely confined to the opinion of one class of the community, not of the most enlarged or enlightened minds; and public opinion, deprived of all unwelcome correction, would be dwarfed and degraded down to the low level of the jury-box. It should seem, therefore, that even apart from positive authority in decided cases, of the precise class now in question, reasoning from the general principles on which privilege in private matters is founded, we might deduce the existence of privilege in the exercise of the right of discussion on matters of a public nature, subject, of course, to the same limitation, viz., that of the honest exercise of the right, by which is meant in law much more than the mere honest belief in the truth of the defamatory imputations conveyed.\* That is not enough, for the obvious reason that a man may publish needlessly what is defamatory, and thus, in law, maliciously, even although he believes it to be true. It may be irrelevant, it may be reckless, and, if so, it is malicious, whatever his belief. Still, honest belief is required, and included.

Let us look now to authority. A great writer on this subject, writing thirty years ago, thus summed up the law upon the subject of privileged communications:—

“The extensive principle which governs this class of cases, where the existence of express malice is the test of civil responsibility, comprehends all cases where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even those of another, call upon him to

\* *Smith v. Thomas*, 2 Bing. V.C. 372; *Bromage v. Prosser*, 4 H. 247; *Woodgate v. Wright*, 1 C. M. R. 57; *Kershaw v. Baily*, 1 Exch. 746.

perform. As, on the one hand, it would be contrary to the common convenience of society to fetter mankind in their ordinary communications, by the apprehension of vexatious litigation ; so, on the other hand, it would be highly mischievous to allow men to inflict the most cruel injuries to character and reputation with impunity, under the cloak and pretence of discharging some duty to themselves and society, when they were, in fact, actuated by the most malicious intentions. The law, therefore, in such cases, most wisely makes the liability to depend on the absence or presence of express malice ; and thus an ample shield of protection is afforded to all who act fairly in order that men may not be deterred by the fear of action or prosecution for making communications which are either important to themselves or beneficial to the public.”—  
1 *Starkie on Libel*, p. 292.

Now, although the writer had only in his mind private communications, the reasoning evidently applies not only as strongly, but far more strongly, to cases of public discussion, which is, in fact, only communications to the public. The reasoning is, in those cases, *à fortiori*, assuming a fair subject of public discussion. It is admitted that in each class of cases there is a right. It is admitted that in the one class of cases there is a privilege in the exercise of the right, because the public interest requires it, that is, “because it would be contrary to the common convenience of society to fetter mankind in ordinary communications.” It is admitted that the reason why there is a right of free discussion is, that the public interest requires it. There can be no doubt, as the very word “free” imports, that it requires to be protected from dread of legal liability in the honest exercise of it. Then, if the law, in its anxiety to protect the honest exercise of private rights of discussion, confers a privilege, surely the law will confer an equal immunity in the case of public discussion.

“In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, and the law considers such publications as malicious unless fairly made by a person in the discharge of some

public or private duty—whether legal or moral—or in the conduct of his own affairs in matters where his interests are concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or emergency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.”\*

Now, although this has reference especially to cases of private communications, it is based, as will be seen, on public interest and the exigencies of society. “Any reasonable occasion.” The fair meaning of the above is, that the inference of malice only arises from the unauthorized publication of defamatory matter, *i.e.*, not in the exercise of any right; and that when the law authorizes the public discussion of matter out of which defamatory matter fairly and naturally arises, so that it is so far within the lawful occasion, and so is not unauthorized, that thus the inference of malice does not arise unless raised by excess. It is true that the Court had particularly in their view cases of what may be called private or personal privilege, which, from its nature, grows rather out of personal relation to the matters in question. But from the very nature of the right of public discussion that cannot be the incident or condition of such privilege or immunity as belongs to it. And since the case just cited it has been well settled that privilege does not regard either duty or interest.

It is true that this doctrine made its way slowly, and it is many years ago since it was thus declared by the present Chief Justice of the Common Pleas, when he sat, as one of the *puisne* judges of that Court, along with the late Chief Justice Tindal, who thus laid the doctrine down:—

“I do not find that the rule of law is so narrowed and restricted

\* Parke, B., *Toogood v. Spyring*. 1 Cr. M. & W. 193.

that a person having information materially affecting the interests of another, and honestly communicating it in the full belief, and with reasonable grounds for his belief, that it is true, will not be excused, although he has no personal interest in the subject-matter. Such a restriction would operate as a great restraint upon the performance of various social duties by which society is kept up.”\*

Chief Justice Tindal and the present Chief Justice Erle thus declared the law fifteen years ago; and though the Court then were divided, and the Judges held a more narrow view of the law as to privileged communications, the larger and more liberal view was lately, in the time of Lord Campbell, deliberately adopted by the Court of Queen’s Bench. Before then, it had been laid down in the Court of Common Pleas, that privilege would attach, even to a volunteer.† And after that, even in the case of a privileged communication, it has been solemnly decided, and in the Court of Queen’s Bench and by some of the present Judges of that Court, that the privilege may attach to a volunteer, and that a party having no personal duty or interest whatever. In the case of *Harrison v. Bush*,‡ the defendant, an inhabitant of a town, had sent a memorial to the Home Secretary, impeaching the conduct of the plaintiff, a magistrate, in the discharge of his duties in matters with which the defendant had no personal interest or concern whatever, nor any interest which any other inhabitant of the town, or indeed any subject of the realm, might not equally be deemed to have. And Lord Campbell, in delivering a considered judgment, to which we observe Crompton, J., was a party, thus boldly and broadly laid down the law :

“A communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminary matter which without this privilege would be actionable. Duty in

\* *Coxhead v. Richard.* 2 C. B.

† *Sommerville v. Hawkins.* 10 C. B.

‡ 5 E. & B.

this canon cannot be confined to legal duties, but must include moral and social duties of imperfect obligation."

And the doctrine is applied even to cases in which there might be legal redress:—

"One mode of proceeding would have been by applying for a criminal information. But another which, though milder, may be more effectual, is to try by lawful and constituted means to have the offender removed from his office. . . . In this land of law and liberty, all who are aggrieved may seek redress, and the alleged misconduct of any who are clothed with public authority, may be brought to the notice of those who have the power and the duty to inquire into it, and to take steps which may prevent the repetition of it."

Elsewhere, in the same judgment, Lord Campbell says it was the duty of all who knew of the conduct imputed, to "try all reasonable means in their power" that it should be inquired into, and overrules a former opinion of the Court, founded on a narrower view of privilege, that the communication must be strictly confined to persons having authority in law to give redress.

In plain truth, it was mere stickling for the terms of an old, dead, abandoned definition to talk of either "duty" or "interest" in any sense, legal or moral, in that case. What "duty" of any kind lay upon Bush to meddle in the matter? And as to any "interest" he might be imagined to have in the removal of Mr. Harrison, it was as remote as it is possible to conceive, and not one whit greater than that which he had in the good conduct of any magistrate, or that which any person had in the character of this particular one. In simple truth, it was only a public interest he had in the matter.

The case, then, established that there may be a privilege in the publication of defamatory statements by a party who has no more than a mere public interest; that is, has no more interest in it than any one else in the country, and who is, therefore, a mere volunteer.

It appears logically to follow from the judgment of the Court in that case, that in a class of cases in which there is no

regular legal redress — as misconduct of magistrates not enough to justify an application for a criminal information — any person having a public interest, as all persons have, in the conduct of the magistracy, might discuss the matter in a public paper; so that he had a basis of fact and truths, or reported fact and public statements, as the subject-matter of discussion. For if there are public reports or statements, it is for the interest of the magistracy itself that they should be discussed; and even if they are mistaken and erroneous, they can easily be corrected; it will be a proof of malice to refuse correction of a vindication or explanation; there would be no greater degree of immunity than is allowed in cases of private imputations, or cases of private privilege; and the reasons for a similar privilege in the discussion of public matters are infinitely stronger.

Whether, or how far, a public writer would have been protected in writing in the press what the defendant in *Harrison v. Bush* wrote to the Secretary of State, would depend on whether or how far it fairly states what naturally arose out of what was already public of the magistrate's acts, or words, or conduct. Whatever was public, was matter for public comment; and whatever fairly or naturally arose out of what was public, his acts or decisions, and his public words, were so; and they might be commented upon, and any inference fairly or naturally arising therefrom. And if the comments imputed unfairness, partiality, or corruption, the question would be, not whether in the judgment of a jury they were fair; but first, whether they were such as fairly arose out of what was then public, or out of fair inferences therefrom; and then whether they were so unfair, and with such an excess of virulence as to be malicious. Assuming that they naturally and fairly arose out of the public matter, the great principle of law is the same as to public discussion, oral or written, that it must never exceed the necessity of the occasion, either as to the extent of publication, or the scope and subject of discussion. Thus a matter may be fit

and fair subject of publication or discussion at a vestry, or other particular meeting, which would be lawful subject of public discussion or publication out of that meeting; \* and so there may be a printed publication excused as to the members of a particular body, as a vestry or joint-stock company, which would not be excused if extending to any other than members of those bodies. This distinction has decided many cases, and is the true ground of the decisions in *Davison v. Duncan* (7 E. & B.), and *Popham v. Pickburn* (7 H. & N.), in which publication to the world of matters which were only excused at vestry meetings, were held not excused.

The law was stated clearly by Erle, J., in a case \* which was decided about the same time as *Harrison v. Bush*; and as that latter case illustrated the principles as to a private communication of a matter of public interest, so the other can illustrate it as applied to a case of the public circulation of a private matter that was held not to be excused, because the publication went beyond the occasion, the matter being private. In the other case the publication was held excused because it did not go beyond the occasion. But there is no indication of any difference in the application of the doctrine of privilege to matters public or private, in any other way than that distinction between them affects the degree of publicity allowed to the discussion of them. As regards the limit or extent of the comment, it is always put on the same footing, whether the matter be public or private, viz., that of malice. Thus is put by Erle, J. :

“The principle seems to be that defamatory words are *primâ facie* malicious. Some occasions rebut the presumption of malice, and these are called cases of privileged communication. If the words be more defamatory than the occasion requires, that again raises the presumption of malice.”

That is, when there is an occasion which rebuts the presumption of malice, the question then is, whether there is

\* *Cook v. Wilde*, 5 E. & B.

anything going beyond the occasion which revives that presumption. Nothing will then sustain the action short of evidence of malice. It is not enough that opinions have been expressed, or inferences drawn, or even statements made of matters of fact, which are erroneous, injurious, and untrue; unless the new statements are so reckless, or the inferences so unfair, as to suggest malice in the mind of the writer. It is not a question whether he has stated facts falsely, or drawn inferences unfairly. Still less is it a question whether his observations are fair. That would be to deprive him of protection, unless the jury happened to agree with him. The question is, has he been so unfair as to show malice. Though that need not be personal.

The "occasions which rebut the *prima facie* presumption of malice" are clearly occasions on which it is lawful to discuss the subject-matter out of which some degree of defamatory observations on the particular matter naturally arises. Such an occasion is that which allows of the public discussion of such a matter as may naturally give rise to such observations. Such an occasion must rebut the presumption of malice, because it affords a lawful excuse for the discussion of the subject. That is what is called the right of fair comment on a public matter, or the public acts, words, or conduct of a public person. That is a right; and the exercise of a right the law allows is a lawful occasion for the discussion of the subject, and therefore a lawful excuse for the publication of defamatory observations which may naturally arise out of it. If this were not so, the right would be a mere delusion. It requires no "right" to publish what is not defamatory. The right of public comment must imply, within some limit, the publication of defamatory matter.

What that limit is, the law clearly defines, and in a substantial, practical, intelligible manner, and just in the same way as that in which it limits privilege in any case, viz., the honest exercise of the right. Where there is a privilege—private or public—the question is, whether it has been



honestly exercised,\* which means, whether what has been written has been written *bonâ fide*, and with an honest belief in its truth, and also has naturally arisen out of the honest treatment of the subject, with no other object than its honest treatment. Within those limits the law allows immunity to honest, though erroneous, injuries to character, rather than fetter the discussion of public subjects of public interest by the fear of legal liability for libel. The limit, it will be observed, is not merely honest belief, but it is the honest exercise of the right, and the honest purpose of its exercise, though that may often depend upon honest belief.

Neither the degree of publication nor the degree of defamation must go beyond the occasion. In matters of a public nature there may be any degree of publication, but then the limit of the degree of defamation is just the same in principle as in cases of private communication, viz., it must not go beyond the fair exigency of the occasion. This it may do in two ways; either by exceeding the scope or subject of imputation, or in the excess of the imputation itself. And, as in the last case cited, it was settled that even in the case of privilege, express malice may be shown without any extrinsic evidence, by the intrinsic evidence afforded in the libel itself, just as it is in cases of the privilege arising out of the right of free discussion. And as in the one case, the privilege cannot go beyond the occasion, that is, beyond the scope or subject of the communication, so neither can it in the other, viz., the scope or subject of free discussion. That is the limit of the right of free discussion. And the privilege which is collateral and incidental to the right, cannot possibly extend beyond it, nor excuse imputations not naturally arising out of the discussion of any fair subject of discussion. Hence we might *a priori* deduce that there must be a privilege in the discussion of public matters, for imputations may naturally arise out of some particular matters in which there is a right of public

\* *Kershaw v. Baily*, 1 Exch. 746.

discussion. And that whether the subject of discussion is such as to afford a privilege for any particular imputations, is a question of law, though whether there has been an honest exercise of the privilege is for the jury.

It might further be deduced that whether a matter is a fair subject for public discussion so as to afford a privileged occasion for defamatory imputations naturally arising out of it, would depend on the nature of the occasion for public discussion, and the scope of the subject-matter thus presented for public discussion, whether by the public acts, or words, or conduct of the party defamed, or by some other lawful publication of the subject-matter. And it might also be deduced that the right would apply not merely to the comments upon admitted acts or published words, but to suggestions of facts in the discussion of a subject, since such is the extent of privilege in private cases. This might be deduced *à priori* from reasoning on the principles of privilege, and it has been established by a series of positive authorities on this particular species of privilege, which we say is annexed to the honest exercise of this right of free discussion, whether by public writers or public speakers.

Now at the very rise of the newspaper press to its present position, as the great organ for the expression of public opinion, it was secured the full and safe exercise of the right of free discussion, by a series of wise and sound judicial decisions, at the opening of the present century, which laid it down that wherever there was a lawful occasion for its exercise, there was an excuse for the publication of defamatory matter, so far as it fairly and naturally arose. And, further, that there was lawful occasion for its exercise upon all matters of a public nature, either the publication of the press itself, or lawful reports of trials or proceedings in Courts of Law or Parliament, or public meetings, or the public words, or acts, or conduct of public men. And that in the exercise of this right, when such lawful occasion arose, the excuse for defamatory matter was only lost by such excess,

either in violence or virulence of language, which should show malice, either personal or general.

It is for the judge, in the first instance, to decide, as matter of law, upon the evidence, whether there has been any occasion for comment on, or discussion of the particular matter out of which the imputation in question might fairly and naturally arise. And, then, it is for the jury to say, whether, assuming that there was such an occasion, the imputations went no further than might fairly and naturally arise, or are so unfair and so excessive in violence or virulence as to be obvious evidence of malice. In the one case the imputations are excused, in the other they are not.

Thus, on a report of a trial for murder, even although the accused has been acquitted, the judge ruled, as matter of law, that there was a lawful occasion for discussing the question of the effect of the evidence as to the legal guilt or innocence of the party on that charge, so far as it was discussed by way of reasoning and argument, and not by way of abuse, and then it was for the jury to say whether there had been such abuse or excess, in which case there was no excuse. So as to comment on matters published by the party complaining of libel.

So as to the right of criticism or comment where the libel imputed to the plaintiff that he published books of an immoral and improper character, and evidence was admitted with a view to show (*i. e.*, to show the judge,) that the supposed libel was a fair stricture upon the common run of the plaintiff's publications, and that therefore they were fair subjects of comment, and the occasion excused any censures upon them. Now, Lord Ellenborough says:

“The main question here is *quo animo* the defendant published the article complained of, whether he meant to put down a nuisance to public morals, or to prejudice the plaintiff? To ascertain this, it is material (*i. e.*, for me) to know the general nature of the plaintiff's publications to which the libel alludes, and the evidence, therefore, is receivable. The plaintiff is bound to show that the

defendant was actuated by malice, and the defendant discharges himself by proving the contrary."

That is, he held that as it was occasion fit for fair public comment (as of course the publication of anything always is), and as that was an occasion *prima facie* rebutting the presumption of malice, the strictures were actionable if not so unfair as to make it obvious that they were malicious. The test he applies to judge of the fairness or unfairness is the existence of malice. Then he went on, in these bold and noble words, to grant a charter of liberty to the press:

"Liberty of criticism must be allowed, or we should have neither purity of taste or of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which has for its object, not to injure the reputation of another, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

Now, as this noble passage has again and again been read from the bench, by judges as eminent as Erle and as learned as Willes, as embodying the law on the subject, it may safely be so taken.

The particular occasion was the most limited one which perhaps can arise in the way of free discussion; namely, that of criticism on a literary publication by the plaintiff. But Lord Ellenborough takes care to lay down the principle broadly, so as to comprise all cases of fit occasion for public discussion. He expressly and explicitly applies the principle to the discussion of facts and events, and to the statement of matter of fact by the public writer within the scope of the subject of discussion. Criticism, comment, discussion—these are the three degrees, so to speak, of the right of discussion. Criticism—which merely describes or denounces the tone or character of the plaintiff's publication, as appears on the face of it; as to say a book is obscene or immoral. Comment—which

\* 1 Campbell's *Nisi Prius* Reports, 351.

from these observations deduces obvious inferences; as that an immoral writer is a man of immoral mind, or that he who writes immoral books must do so for some bad purpose. Discussion—which, in regard to public matters, blends inferences, or opinion, or suggestions, as to facts, with the expression of other opinions.

There must be such an incident to the right of free discussion of public events, as there is in privileged communications on private matters, unless the private matters are regarded as of more public interest than the public; or unless the exercise of a public right, so invaluable as that of free discussion, is regarded as of less importance than mere private rights. It is plain that Lord Ellenborough used the word discussion in this sense, for he employs it in a distinct sense from mere criticism or comment, and in connexion with the truth of history, and with “misrepresentations of fact.” He evidently deems that matter of fact on subjects of a public nature, public acts, public events, and the conduct of public men in relation thereto, are as much fit occasion for public discussion as the contents of a published book; and all alike he treats as privileged occasions. That is, as in the previous passage, the presence or absence of malice is made the test. The question is not whether the jury think the comments fair, but whether they think them so unfair as to show a malicious object. This is manifest from the whole of the context. First, Lord Ellenborough says, that any publication by the plaintiff is an occasion for public comment. Next, he clearly treats that as a privileged occasion; for he expressly says it rebuts the presumption of malice, which is the strict definition of a privileged occasion. Further, he lays it down, that the writer may correct (what he deems) misrepresentations of fact, which go beyond mere comment and criticism. Moreover, he may, in commenting on the plaintiff’s publication, “censure what is hostile to morality:” that is, hostile to purity or honesty, or any other moral virtue. And as he is speaking of what may be done on the general issue, and the very objection was that the defence

ought to be pleaded as a justification, it is plain that he could not have meant merely that the writer might censure what the jury should think "hostile to morality" (as, for example, to honesty) in the plaintiff's publication, for that would amount to a justification on the score of truth. And Lord Ellenborough was not likely to have laid down so delusive and, indeed, nonsensical a proposition, by way of privilege to public writers, that they might write what they could prove to be true.

Here, then, it is obvious that the whole spirit and scope of these remarks apply peculiarly to public writers upon all public topics fit subject for public discussion; and that no limit is laid down, save that of an honest exercise of the right or privilege of free discussion, and the absence of malice, personal or general. Not a word is said as to the opinion of the jury, that the observations are fair. It is obvious that this would make the right or privilege worse than nothing; it would be a mere delusion and a snare to entrap public writers. No writer could be certain of immunity, however honest his exercise of the right; for it would depend entirely upon whether his observations might happen to commend themselves as fair to a jury, probably of opposite opinions and feelings; not to say hostile prejudices and passions. Nothing is more difficult than to estimate the fairness of opinions we dislike, and expressions we disapprove of. But malice, or no malice, is an intelligible simple issue. It is manifest then, that what he must have meant was, that the public writer was privileged to censure in the plaintiff's publication what he, the writer, deemed to be hostile to morality or honesty, within, of course, the limits always prescribed to privilege of any description, viz., that the comment must be relevant, arise out of the publication commented upon, and must not be so unreasonably and recklessly defamatory as to restore the presumption of malice.

In that case, however, it turned out that the plaintiff had not published the work ascribed to him. But that, of course, not only does not affect the law laid down, but rather confirms

it; for his verdict being rested on that ground, implies that if he had published the work, then the imputations founded thereon, however unfounded in the opinion of the jury, would, if not so reckless as to be malicious in law, have been privileged, and that the judge would have directed a non-suit, unless there was evidence of reckless spirit.

Lest it should be supposed (as we have reason to suspect it has been), from the language used in another case, tried at the same time, before Lord Ellenborough (*Carr v. Hood*), that the privilege was restricted to ridicule and not to reprobation, we advert to that case only to remark that it was a case of ridicule; and, of course, therefore the judge chiefly dwelt on that species of libel. But so far from his remarks confirming the public writers' privilege to ridicule, his language in this, as in the previous case, plainly implies the reverse. "We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and to ridicule, if their compositions are ridiculous." It is true, he goes on to say, "Reflection on personal character is another thing." And this, we are aware, has been eagerly laid hold of, as showing that the right or privilege of fair comment can never excuse personal or moral imputation. But it is plain from what follows, that it was imputations upon private character, unconnected with the subject of public comment, to which the judge was alluding. For he adds more clearly, "Show me an attack on the moral character of the plaintiff, or any attack upon his character, unconnected with his authorship, and I shall be as ready as any judge to protect him."

Now, so far from this implying that a man's moral character may not be impeached by way of comment upon his publications, which would be absurdly in contradiction of the previous ruling of the same great judge (for to impute that a man publishes immoral words, is itself the gravest imputation upon his character), it obviously implies exactly the reverse, viz., that his moral character, as connected with his authorship, i.e., as embodied in the writer's honest opinion in the publication

commented upon, is within the scope of fair comment. If it were not, then in the worst cases, the right of comment or exposure would come to nothing: and what power would a public writer have to censure what is hostile to morality or honesty in a man's publications—as every word must, of necessity, reflect heavily upon his moral character? And so the great judge goes on further to explain his meaning :

“Had the party writing the criticism followed the plaintiff into domestic life for the purpose of slander, that would have been libellous, but no passage of this sort has been produced ; and it does not affect the plaintiff except as the author of the book.” “The works of this gentleman may be, for aught I know, very valuable, but whatever their merits, others have a right to pass their judgment upon them and to censure them if they be censurable.”

That is, if they, the public writers, honestly deem them to be censurable; for the learned judge had just said “whatever their merits.” That is, whether or not the works are censurable, or are “hostile to morality or honesty:” the public writers have a right to pronounce them to be so ; and, therefore, in the latter case, certainly to convey very heavy imputations upon moral character, provided they are not so reckless as to revive the presumption of malice.

A long series of *nisi prius* rulings from the time of Lord Ellenborough to the time of Lord Tenterden, and thence to the days of Tindal and of Erle, have confirmed the same principle of the privilege or immunity of public writers upon public matters,—and especially on published matters,—to make criminatory or defamatory remarks, not only on the matters so published, but on the character of the parties publishing them as connected therewith, provided only they wrote honestly, *i. e.*, in the honest exercise of their right, and for the honest purpose of its exercise, and not in a reckless spirit of defamation. The purpose is made the test: the object is shown by the presence or absence of reckless defamation.

Thus it was laid down by Lord Tenterden that “Whatever



is fairly written of a work, and can be reasonably said of it, or of its author, as connected with it, is not actionable, unless it appear that the party, under the pretext of criticising the work, take an opportunity of attacking the character of its author." \*

And so the same judge laid it down thus: "A fair, reasonable, and temperate, though erroneous criticism of works of art, not written for the purpose of hurting the plaintiff in his profession, is not a libel."†

It is plain, from the whole effect of these rulings, that what was meant was not that it was for the jury, whether, assuming the comments to be on what was fair subject of comment, viz., the book, the work of art, &c., the comments were such as they thought fair and reasonable, for that would make the liability of the writer to depend upon their agreement with his comments. The words "fair and reasonable," obviously are used to convey that the comments, whatever their nature, must, in the first instance, fairly, and naturally, or reasonably arise out of that which is the lawful subject of public comment. That is to say, out of the book, the work of art, or the public matter put forth. That is, the writer might from voluptuous books, or obscene works of art, denounce them as showing an obscene mind in the author or artist; though if he used very violent language, that might be for the jury as evidence of excess and of malice. But if he made specific charge of immorality, that would be wholly beyond the occasion, and, as a matter of law, not excusable.

Now it appears to follow from the foregoing, that whatever is already published may be made matter of public discussion. The whole of what is public, and every part of it, but nothing beyond, or beyond such fair and natural inferences therefrom as must pertain to the honest exercise of the right of discussion. If acts alone, then acts and fair inferences therefrom; but if the acts are in the discharge of public duty—as the decision

\* *Macleod v. Wakeley*, 3 C. & P. 311.

† *Soane v. Knight*, M. & M. 74.

of a magistrate—then it cannot be a fair inference from the acts themselves that they are corrupt, partial, or in any way improper, as the presumption of law is that they are honest. But if the public acts consist in or contain a public exposition of grounds or reasons for acts or conduct, then those grounds and reasons will be fit subjects for comment; and any inferences fairly, naturally, and reasonably arising out of them. And these may raise considerations of malice, and may suggest suspicions of corruption. If so, their motives may be fit subject for comment. This is matter of law, and to the extent to which it is ruled that there is fit subject for comment or discussion—that discussion is excused, although defamatory, unless it is so excessive as to be malicious.

But there must be some publication, or some public material or subject-matter for discussion, to afford some ground or colour for the particular imputation made in such discussion. Thus, unless there is any public manifestation or exposition of motives, or reasons, or intentions, there is nothing to comment upon as regards either motive, or reason, or intention. And so in *Parmeter v. Coupland*,\* where the libels imputed to a magistrate partial and corrupt conduct as such, without, so far as appears, the least pretence for the imputation, the Court of course said, speaking of such a case, that “though every subject has a right to comment on the acts of public men, any imputation of wicked or corrupt motives is libellous.” Of course it is, and must be in such a case. It is an outrage upon language to call such an imputation “comment.” There is nothing to comment upon but the act itself, which, *per se*, implies that it is honest and upright. The Court never dreamt of such a monstrous proposition as that if a public man chose to put forth an exposition of his motives, a public writer might not comment thereon, and then honestly, but erroneously, draw inferences which conveyed imputation. No case relating to comment upon the plaintiff’s publications was cited in this case, clearly showing that Court and counsel thought they had

\* 6 M. & W. 105.

nothing to do with it. And as there is a right of free comment upon, or free discussion of any published matter, or any public work, so there is a right of free comment upon, and free discussion of the acts and conduct of public men, that is, in so far as they present fair subject for comment or discussion; which, be it observed, is only as to the acts or conduct so far as they are public, and does not include grounds, or reasons, or events, or motives, except so far as they also are made public, and are already matter of public exposition:—

“There is a difference between publications relating to public and private individuals. That criticism may reasonably be applied to a public man in a public capacity, which might not be applied to a private individual. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentaries a cloak for malice and slander, but any imputation of wicked or corrupt motives is unquestionably libellous.”\*

That is, such imputations, merely on the acts themselves are not excusable; as they are not, and cannot possibly be, made by way of comment or discussion thereon, the motives not being matter of a public nature, and so not fair or fit subjects of comment at all, of any comment, fair or unfair; so that, of course, any imputation defamatory is not excused and so cannot be protected.

The rule of law as to the relative province of judge and jury in such cases, was laid down very clearly in the same case:—

“A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication the subject of inquiry is of that character, and would be likely to produce that effect, is a question upon which the jury are to show and exercise their judgment as a question of fact. The judge, as a matter of advice to them in deciding that question, might have given his own opinions as to the nature of the publication, but

\* *Parmenter v. Copland*, 6 M. & W. 109.

was not bound to do so as a matter of law. And, indeed, the judge ought not to lay it down positively that if the publication is proved, and the words were used in their ordinary sense, the jury must find that they were libels. He ought, having defined what is a libel, to refer to the jury the consideration of the particular publication, whether falling within that definition or not."

That is, whether the publication, if not excused, is libellous, is for the jury; whether there is an occasion which may excuse it, is for the judge. Whether, again, the occasion does excuse it, or has been in the honest exercise of the right, is for the jury; or whether the defamation has gone beyond the occasion and exceeded the excuse, and so by reason of excess is malicious, is for the jury; though whether there is such evidence of excess, is for the judge.

The right of public comment must, from its very nature, be restricted to what is public; and so long as a man's motives remain private with no public indication or disclosure of them, how can they be a matter of public comment? If, indeed, a magistrate in making his decision, plainly contrary to evidence, and without any evidence at all which to rational mind could account for his decision, also makes remarks which appear to reveal an animus, and a partial feeling, or an indirect object, even although, in point of fact, his decision is perfectly honest, will any lawyer doubt that a public writer honestly commenting upon the case, coupled with those expressions, might not be privileged, in an imputation or suggestion of bad motives? Would it not, then, be an occasion of fair comment upon the motive, and would it be for the jury whether the comments were fair? Would it not rather be, are they so unfair as to be reckless?

This distinction was very forcibly brought out in the remarkable case of *Gathercole v. Miall*,\* which was very carefully considered by the Court of Exchequer, after full and able argument by most eminent counsel, and which appears perfectly to confirm the course of the present argument, and

\* 15 M. & W. 320.

the conclusion to which it tends. There the libel, published in a newspaper, conveyed serious imputations upon the plaintiff, a clergyman, of bigotry and want of charity, as indicated in his management of certain private or congregational and parochial charities, in a general and a public sense, and also as indicated in his preached but unpublished sermons. The terms of the libel are not given, but it is pretty plain that they implied a degree of bigotry and want of Christian charity, which, in a minister of religion, would tend as much to hold him up to hatred, as an imputation of want of honesty might in the case of an ordinary layman. The learned judge (Baron Parke) told the jury that every one had a right to comment upon public acts of public servants, but not on the unpublished sermons of a clergyman, and "that the public acts of public servants furnished a lawful excuse for publication, but not a sermon preached by a clergyman, unless he published it, and therefore offered it as a subject of general criticism, like any other work; and that the rules which a clergyman made for the conduct of a charity which he established, was not thereby made a subject for public comment." The Court were somewhat divided on this point, so far as the sermons were concerned; but they, one and all, in their carefully considered judgments, clearly implied that, if the occasion was one of publication by the plaintiff, and so an occasion fit for public comment, it would warrant imputations which would not be excusable in matters not public, and would be limited only by the well-known restriction established in all cases of privilege, viz., that they must be conceived in a fair spirit, and the absence of that reckless spirit of injury which the law deems malicious. Thus Baron Parke said, of a person, who by publication gives lawful occasion for public comment: "The position such a party is in gives occasion to all the public to make remarks on his conduct; and if those remarks are made in a fair spirit, they are justified under the general issue." Observe, "made in a fair spirit." The learned judge does not say they must be absolutely fair, or

fair in the judgment of the jury, still less with reference to the actual facts; but that it is enough if the remarks are written in a fair spirit; that is, fair with reference to the position of the writer, and his means of knowledge or of judgment, and especially with reference to the materials before him at the time he wrote; and to the light in which he would naturally look at them, and the point of view with which he would naturally regard them, and the state of his mind. Thus, also, Chief Baron Pollock speaks of the right of fair comment in these terms. He calls it "criticism, or the enlarged style of commentary which that word seems to introduce, according to the decided cases," and justifying, he says, "*bond fide* remarks, whether founded [or not,]\* in truth, in point of fact, or justice, in point of commentary, provided only they were an honest and *bond fide* comment," and this might be shown on the general issue.

These latter words alone would imply that the comments might be fair, although untrue in fact, or unfounded in justice, for otherwise there would be a justification, which would require to be pleaded. But the Lord Chief Baron did not leave that to inference; he carefully and explicitly lays it down in terms, that the comments may be fair, although they are untrue in point of fact, or unjust in point of commentary. And, moreover, his language plainly implies, and indeed expresses, that the comment may include fair inferences of fact. And he goes on to say of the proceedings of public persons, "they are deemed to be public property, and all *bond fide* and honest remarks upon such persons and their conduct" (*i.e.*, their public conduct), "may be made with perfect freedom, and without being questioned too nicely for either truth or justice." To make his meaning clearer, he goes on to say that so long as the sermon remains unpublished, "you are fettered as you would be with respect to any other matter on which you have

\* These words are plainly implied from the context, and indeed necessary to make the construction correct, and are clearly left out by some accident, clerical or typographic.

a right to comment, but on which you must comment with truth and justice.”

And so as regards the rules of the charity. “It is a private matter, and is not open to what may be called licentious comment, as opposed to comment that must be based on truth.” Plainly implying that in the case of a matter public in its nature, the comment might extend beyond the limits of actual or absolute truth, and might be, in comparison with what it must be in a private matter, “licentious,” *i.e.*, as the context shows, not “licentious” in the worst sense, of what would be reckless and malicious, but as opposed to or compared with a right “fettered” and restricted by actual truth, which is in a private matter the limit, unless in the case of a privileged communication. The Lord Chief Baron makes this still clearer by going on to contrast the case he was considering, of a matter private and not public, with the class of cases we are considering, of comments on publications:—

“With respect to criticism on works published, they invite that criticism, they are held out for examination. . . . In the present case the question is whether a private matter may be made the subject of licentious comment. . . . I think that [*i.e.*, in this case] every purpose of public good would be answered by strictly confining it to the privilege that every man has of publishing that which is true; and that it is not at all necessary in a case of this sort [*i.e.*, a case of a private matter] to give him any power either licentiously, or with honest prejudices, to invent for himself, or to misrepresent or comment upon matters that do not exist in point of fact, however honestly.”—(P. 334.)

It is clear that the Lord Chief Baron had the same view of the law as to comments upon published matters as that which Lord Ellenborough had, *viz.*, that it is an occasion of privilege to this extent, that it excuses comments even drawing inferences of fact, and conveying moral imputations; if honest in the sense of being in the earnest though erroneous pursuit of the object of the right or privilege, *viz.*, free discussion,

and not so reckless as to be malicious, even although beyond all doubt unfounded and unjust in point of facts.

And all that the other judges said was quite consistent with this view. Thus Baron Alderson said, in a passage which was most likely in the mind of the Lord Chief Justice, in *Campbell v. Spottiswoode*, but was, as we conceive, not quite apprehended (p. 338.)—

“There is a distinction between the comments upon a man’s public conduct, and upon his private conduct. You have a right to comment on the public acts of a minister. . . . but I do not know where the limit can be drawn distinctly, between where the comment is to cease, as being applied solely to a man’s public conduct, and where it is to begin as applicable to his private character . . . but you ought not to be permitted to say of a minister that he has committed felony, or anything of that description, which is in no wise connected with his public conduct.”

So far from this implying that you may not in public comments on a man’s public acts or published opinions or proposals, argue and infer therefrom imputations on his moral character, they appear plainly to imply just the opposite, viz., that you may do so, so long as you confine yourself to honest comments on what is public or published, and do not go into private matters.

It is to be observed, however, that the learned judge was speaking, not (as we are) of cases of published proposals or opinions, but merely of public acts; which, especially if acts of duty, so far from supporting imputations by way of comment or of inference, lead to just the opposite inference. So Baron Rolfe (p. 342) laid the law down substantially in the same way, and still more favourably to the public writer, and puts it still more clearly upon legal principles :

“In every action of libel, the act done is alleged to have been done maliciously ; and in the case of a libel upon an individual, it is conclusive that it was done maliciously, unless there be shown justification. But in the case of comments upon the public acts of public



servants (and there are other cases to which the same observation would apply), you may at the trial, on the plea of not guilty, show that what you have done is a justifiable act, by showing, what amounts in substance to this, that it is not done maliciously."

It is true the learned Baron went on to say, "If I make reasonable comments upon the conduct of public men in the discharge of their public duties, I am justified." But then, he was speaking of the acts of public men in the discharge of their public duties, and not of a man's published opinions or proposals, especially if for his own pecuniary benefit. And, as already observed, an act, at all events in the discharge of a public duty, can never, *per se*, be, properly speaking, the subject of comment, in the larger sense of inference which is allowed as regards published opinions or proposals. But the learned judge went on to explain what he meant by "reasonable." "There is no pretence for saying that any one of the observations made in this libel could possibly have been treated as fair observations;" and lest there should be any misunderstanding, Baron Parke added some further observations, in the course of which he said—

"The question is whether there was any occasion which would justify the remarks that had been made, or any remarks upon the conduct of the plaintiff; because if the statements contained in this paper are true, the rule is, that the defendant must plead the truth of them; but if the plaintiff has given lawful occasion by his conduct for the remarks, that is evidence under the general issue. And I am of opinion that an individual who gives to the public any literary work, does give occasion for remarks."

Thus, then, the fair result of the full and well considered judgments in this remarkable case is quite in accordance with the great rulings of Lord Ellenborough, viz., that a man by publishing any opinions or proposals of his own gives lawful occasion for public comment or remark, and that these comments or remarks are privileged if written honestly and in a fair spirit,

and not so unreasonably or recklessly as to be malicious, even although utterly unfounded, unjust, and injurious.

It might have been supposed that, if there were one thing more than another which was proper subject of public discussion, it would be a sermon, which may, it is well known, be a polemical or even political discourse in the last degree exciting to the public mind. Every one will recollect Burke's trenchant comments on the remarkable sermon by Dr. Price, at the Old Jewry, in favour of the French Revolution. And in nearly our own times, there has been a prosecution for sedition, on account of a sermon.\* And so of any other public act of a minister of the Established Church, in that capacity, even although relating to a parochial charity, because, though, no doubt what is parochial is not strictly public, it certainly is not private, and the acts of a public man in his public capacity, with reference thereto, could not fail to make of public importance, whether by way of example or otherwise, anything wrong in principle, whether legal or moral. If, for instance, a clergyman in administering a parochial charity, did so on principles of sectarian and narrow-minded intolerance, that surely would be of public cognizance, as a matter of public scandal, of crying injustice, and of evil public example. It is impossible not to see that the views expressed by the Court on that part of the subject are somewhat confused and unsatisfactory. But of this there is no doubt, that assuming an occasion and a subject for public discussion, the opinion of the Court was, that there would be, in the exercise of that right, an immunity from legal liability in the discussion of that subject.

Although, however, the case of some publication by the plaintiff himself is perhaps apparently the clearest, it is obviously the most limited, occasion for public discussion, as, unless there be superadded on the plaintiff, the character and position of a public man, and public acts and conduct on his part, *per se*, the fit subject of public discussion, the right will

\* Adolphus's "History of England," Reign of Geo. III.

be limited to such subjects as are presented by the plaintiff's own publication. The public acts or conduct of public men are, however, we have seen, in a certain sense, public property, and, *per se*, fit subjects of public discussion. The limits of the right of free discussion in such case, however, if necessarily larger, are for the same reason less easy of definition or description. And here, indeed, arises the greatest difficulty of the question, as it is also its most important aspect.

The solution of the difficulty in each case, however, must depend on the steady application of the same principle as in the other class of cases, and a careful attention, above all, to the nature of the occasion which arises for discussion, and the scope of the subject-matter presented for discussion. It is obvious that this, in the class of cases we are now considering, depends greatly on the nature of the public acts or conduct discussed. Acts vary considerably in their nature and in the extent of material they present for consideration and discussion. These, indeed, depend a good deal on the surrounding facts and circumstances. Some acts have more of these than others, and of a very different nature. In the decision of a magistrate there are the evidence, the relative position of himself to the parties, the observations he has made, and the like—all circumstances whence the nature and motive of this act may or may not become fit subject of discussion. A judicial decision is, perhaps, the easiest instance of the class.

The most difficult class of cases is that in which the subject of discussion is the public conduct of a public man, which conduct itself is more or less subject of doubt and dispute, as a matter of fact. That is, there is, or may be, a two-fold subject of discussion as to the acts or conduct of public men: first, what it has been as a matter of fact; next, what it is to be deemed or described as matter of opinion. And, perhaps, in most instances, there is a middle sort of cases, in which more or less inferences of fact are drawn from admitted facts as well

as inferences of opinion, on facts admitted or inferred. Now, to make the right of discussion anything, it must embrace all three, so far as there is a basis of undoubted truth and fact, out of which all these may naturally and not unfairly arise. On this class of cases there is a singular absence of positive authority.

There had hardly been any case of defamation as the excuse of the right of free discussion on public acts of a public man, or materials affording scope and subject-matter for defamatory imputations. That is, there had been no such case reported; fortunately, we are in a position to supply a notice of a most remarkable and valuable case exactly of that character, which, for no reason that we can divine, except that eccentricity which constantly leads reporters to omit the most important cases, does not appear to have been reported in law reports. This case is, perhaps, the most valuable of any that has ever occurred upon the subject, on account of its really involving the necessary question of privilege in such cases, and on account of the high character of the judges composing the Court at that time, and the bold, decided way in which they met the case, and acknowledged, or rather asserted the privilege of the press, in the exercise of the right of free discussion.

It was an application for a criminal information; but there were all the requisites of such an application, and the decision went entirely on the ground of privilege or excuse from all legal liability.

In that case there had been a publication of some Parliamentary papers upon the war in Scinde, and there was an article thereupon in the *Quarterly Review*, for September, 1852. That article was one in which very serious imputations were made upon the character of Sir Charles Napier. The libel was chiefly in allusion to his treatment of the Ameers of Scinde, speaking of the "harshness of the demand made by him," and which led to their conquest, and charging him with the plunder of the palaces at Hyderabad, "even to the women's wardrobes," and contained this passage:—

“No one believes that the Ameers, by their conduct, received more than friendly advice or warning. We doubt if the Governor-General originally intended more; yet what have they received, through Sir Charles Napier’s ungovernable determination, at whatever cost, of confounding the innocent with the guilty, to achieve a conquest!”

Here was a clear charge against a public officer, not only of an act censurable in its own character, but also proceeding from a most vicious motive, and for a most improper purpose, “an ungovernable determination, at whatever cost, of confounding the innocent with the guilty, in order to achieve a conquest,” in which shameful plunder, after capitulation—a disgraceful act, contrary to the Articles of War, and a gross piece of military misconduct—was committed. The applicant denied the truth of these charges *in toto*, and it appeared that there were public sources of information, from which the writer could have discovered their falsehood. There had been a publication before Parliament of official papers relating to the annexation of Scinde, and these told the whole story. The *Quarterly*, in an article on the subject, by way of a review of these papers, had severely attacked and censured the conduct of Sir Charles. Yet the Court refused the application, and Lord Campbell said:—

“If you could persuade us that the article was written with the intention of calumniating Sir Charles, that would require an answer. But there is no evidence of that. The article seems to be an historical essay on a disputed passage in history, as to whether the Ameers were treated with harshness or generosity, and I should be encroaching on the liberty of the press to grant an information in such a case. The Court sits, upon constitutional principles, to repress the licentiousness of the press, but nothing more. Whatever may take place elsewhere, we hope that this country will still continue to boast of a free press, and that questions of history, modern or ancient, may be discussed freely, without dread of a criminal information.”

And of course equally without dread of an action. The same

principle would equally apply. We do not suppose that Lord Campbell meant by "the intention of calumniating Sir Charles," a particular intention of that kind, or any personal malice. He, no doubt, meant a general intention of writing maliciously; the general malice implied in reckless writing—a spirit of defamation, instead of the spirit of discussion.

Lord Campbell, however, as Lord Ellenborough had done fifty years before, in cases he had himself reported, makes it a question, in that sense, of the object or intention of the writer, which in regard to imputations, obviously defamatory and admittedly false, would be, of course utterly irrelevant, unless it were a question of privilege. Lord Campbell holds, in the first place, that the occasion was one for free discussion on the particular matters of the imputation, even to the extent of suggestion of a preconceived design to effect a wicked and unjustifiable conquest, by a conscious violation of moral right. And these matters, no doubt, were raised by the official papers which had been published; although, as they were published by Parliament, who admired and upheld Sir Charles, it is needless to say that they contained nothing to warrant the imputations themselves. Lord Campbell repeatedly declared, that he took it for granted they were utterly false. Beyond all doubt, they were really defamatory—defamatory in a moral, not merely in a political or military sense. Yet they were held to be excused, because there was a right of free discussion of the particular matters to which the imputations related; and they were, it is evident, held not to have been excessive or malicious, but to have been published in the honest exercise of the right of free discussion. And thus, though they went far beyond mere comment or criticism (indeed the contents of the papers were only partly Sir Charles's despatches or letters), and were in the way of defamatory deductions or inferences of the writer's own, founded on materials lawfully published, by way of argument thereon, not of mere invective or abuse; first, there was the right of public discussion; and then, an excuse, immunity, or privilege, for defamatory imputations, in the honest exercise of that right.

That case is of the more interest on account of the fact, that two of the judges who concurred in it, Mr. Justice Wightman and Mr. Justice Crompton, are still members of that Court, and that Mr. Justice Erle was the judge who, a few years afterwards, tried the next great case on the subject, *Turnbull v. Bird*. We shall see how firmly and how fearlessly he applied in that case the principles he had united in attesting in the remarkable case of Sir Charles Napier. And before passing from that case, we desire in particular to call attention to this, that after having affirmed the right of public discussion of the particular matter out of which the imputation fairly arose, Lord Campbell does not treat it as a question whether, in the opinion of the Court, the imputations were fair. On the contrary, he clearly implies, in various of his observations, that the Court thought they were not so. But to have decided against the writer on that ground, would have been to make his own opinion the measure of the right of public discussion!—a monstrous conclusion, from which his strong good sense and sound knowledge of law preserved him. Having affirmed the right of free discussion as to the particular matters, and held that the imputations fairly arose out of those matters, he treats it as a question of malice or no malice; and in that view, as a question of the animus, the object, the intention of the writer. That is, he affirms privilege, and then considers its honest exercise, without malice or excess.

In entire accordance with these conclusions, Mr. Justice Willes ruled, in a case tried some years ago on the Home Circuit, the case of the *Athenæum*,\* the editor, referring to some announcements by the plaintiff and others, of sales of pretended antiquities, denounced them as a “gross attempt at imposition;” and the learned judge directed a verdict for the defendant, or a nonsuit, without leaving it to the jury at all; there being no evidence of malice; and “the publication being pro-

\* *Holmes v. Eastwood*, 1 Fost. & Finlason.

tected by the privilege of a fair discussion on "matters of public interest." The plaintiff was not named in that case, but that would not matter, as there was evidence that he was included, and intended, and understood to be alluded to, *inter alios*; and though the learned judge observed upon that, it was rather, it should seem, in aid of the other and better ground of decision, as showing that there was an entire absence of personal malice. However that may be, the learned judge laid that principle down boldly and broadly. He laid it down that there is a privilege whenever there is a right of public discussion; and that there is this right of public discussion of matters of fact (not "comment" merely) on any question of public interest. And that, when there is such an occasion, it is a question of malice or no malice. Nothing is clearer than that, when there is a privilege, malice must be proved, and therefore its absence must be presumed, until such proof is given; though it is equally clear that the proof may be supplied by the nature of the publication itself, its excess of violence and virulence, and such a degree of unfairness as to amount to evidence of malice: a reckless, unnatural, or spiteful tone and temper of writing, a savage spirit of defamation, easily distinguishable from that of fair, though caustic and severe, censure. It is not a question in such a case (according to the above authorities) whether the observations are fair in the opinion of the jury; that would be fatal to freedom of discussion, as it would make juries absolute masters of public opinion. The question is, whether the observations are so grossly unfair as to be malicious. The precise point on which the immunity may turn will vary with the circumstances of each case; for in one case the honest exercise of the right will turn on one point, and in another case on a different one. If, for example, it is admitted that the occasion is one for public comment, but the particular observations complained of are irrelevant, honest belief is not material. So if there is an



excess of virulence or violence. So if there be actual personal malice. But if there is no question that the observations were honestly meant for the purpose of discussing the subject, and they are relevant, and do arise out of the matter, naturally enough, though by way of erroneous inference or suggestion; there the question will turn upon the honest belief in the truth, for upon that it will depend whether the writer wrote honestly and in the honest exercise of his right; and if not, then the presumption of malice arises, as it will arise when there has been excess of violence or virulence, even with honest belief. Assuming a lawful occasion to discuss a subject out of which defamatory observations may naturally arise, then they are excused, within the point of publication, and the scope of such discussion, so far as they do thus naturally arise; and provided they are not in excess of the particular occasion, supposing it thus to have arisen. That is supposing there is a lawful occasion and excuse for making defamatory observations, by reason of there being an occasion of public discussion of a subject, out of which they may naturally arise; then the question, how far they have arisen, and whether there has been an excess, is a question for the jury, for it is a question of malice. And assuming the other requisites of the protection, that is, an occasion and excuse for some defamatory observations on the subject, the question will be, either as to oral or written discussion, "whether the statement was *bonâ fide* and honestly made, and the defendant thought at the time it was true."\* It was so held of a discussion at a vestry meeting, and the same law of course would hold, as to a fit subject for discussion at a public meeting, or a fit subject for discussion in a public newspaper. So in the remarkable case of *Turnbull v. Bird*. In that case, in which the action was against the writer; the libel imputed to the plaintiff by way of criticism, or comment upon

\* *Kershaw v. Bailey*, 1 Exch. Rep., 746.

his writings, that his integrity was so doubtful that there "was need of three gentlemen to watch him; that the papers entrusted to him, were not safe in his keeping; and that persons like him, and of his opinions, would be likely to burn any such papers." There was thus the direct suggestion or assertion, as an inference of fact from the nature of the plaintiff's public opinions, that he was utterly untrustworthy. It is a complete mistake to suppose, as some do, that it was a mere attack on Catholics in general. It was just the reverse; it was purely personal, and pointed to the plaintiff himself, as founded upon his writings, his published opinions, his peculiar expressions, his particular antecedents. And it would be impossible, as the judge (Lord Chief Justice Erle) said, to conceive a more direct or more odious imputation upon the personal character of the plaintiff. It professed to be founded, however, partly on the plaintiff's published and uncompromising adherence to the morality of the Jesuits, and their "Constitutions" were relied upon as loose on moral principle. Moreover, it was accompanied by a distinct and independent assertion of a matter of fact, by way of inference from other facts, that the plaintiff was so distrusted, that he was actually watched. And, on the other side it was said, that not only was the construction put upon the Constitutions of the Jesuits false, but grossly false; and that not only was the representation of matters of fact untrue in fact, but that it was wilfully false; and that the writer knew enough of the plaintiff's antecedents to be aware that what he imputed must be false; so that there was far more than mere comment or criticism; there were even inferences of fact as well as of opinion, there were statements of matters of inference, both of fact and opinion, in the highest degree injurious to the plaintiff, morally and personally, as well as in his office of honour and trust. Yet the Lord Chief Justice did not hesitate to lay it down broadly, that as the office and employment was

public, and the matters stated, as well as the subject matter of comment related to it, even although they were also connected with personal character, the occasion was privileged, and the writer protected from legal liability, provided he wrote honestly, and in the honest exercise of his right.

This of course necessarily implies that in the view of the Lord Chief Justice there was a privilege to a public writer, that is, a protection or immunity from legal liability for defamatory matter, in the honest exercise of the right of free discussion on public matters; for otherwise, of course, the facts of *bona fides* or of malice would have been irrelevant, and could not possibly have arisen. And it also implied that Lord Chief Justice Erle considered, and held, as matter of law, that in this instance there was a fair occasion for discussing the particular matters out of which the imputations arose, viz., the nature of Jesuit morality, the degree of the plaintiff's adherence to it, and the probable effect of it in his discharge of his public duties. On the other hand, it is clear that Lord Chief Justice Erle deemed that there was evidence of actual malice in the legal sense (as obviously there was in several ways) or otherwise he would have had to direct a verdict for the defendant. But he left that evidence to the jury, with a direction which in substance amounted to this, that there is a privilege or protection to a public writer in the exercise of his right of free discussion, on matters fair subjects of discussion for defamation, naturally or necessarily arising out of the honest exercise of that right.

Thus the Lord Chief Justice Erle directed the jury in these terms:—

“There is no doubt that the matter complained of is a libel, and would entitle the plaintiff to your verdict, unless the defendant can establish a defence. Now the law is, that defamatory matter is presumed to be malicious unless it is published in the performance of any duty, legal or moral, or in the exercise of any right. The defence on the present occasion comes under the latter head, as a

matter necessary to the protection of the public interests, or in the exercise of a public right; and the law is that a man may publish defamatory matter of another holding any public employment, or if it is a matter of which the public have any interest, within the limits I shall lay down in accordance with decided cases. 'Every person,' it has been laid down, 'has a right to comment on the acts of a public man, which concern him as a subject of the realm, if he do not make his comments the vehicle of malice or slander.' And I am of opinion that the occasion here would justify the comments, provided they can be brought within the limits laid down by the law in this class of cases. Now, the rule in these cases is that the comments are justified provided the defendant honestly believed them to be true. Within those limits the law allows the publication. The word malice in law means any corrupt motive, any wrong motive. And if you are of opinion that the defendant in the comments he made was guilty of any misrepresentation of fact, or if he made his comments with any known misstatement of fact which he must or might have known to have existed if he had exercised ordinary care, then he loses his privilege, and the occasion does not justify the publication. You are to consider the antecedents of the plaintiff as they might have been known to the defendant, and to judge whether, under the circumstances, the publication was *bonâ fide*, and whether the defendant could honestly have believed that the plaintiff was capable of the acts suggested as likely to be committed by him. It is for you to judge whether the misstatement was reckless, or made with a want of ordinary care and caution, and whether the comments made on the plaintiff's former writings were fair and just (that is, as he went on to explain), whether the defendant, fairly and honestly, in the exercise of the privilege the law allows, published what is complained of." \*

That is, whether they were fair to the mind of the writer, supposing him to use ordinary care and not to be reckless and careless, but to be honestly pursuing his privilege. It was not put to the jury simply whether the defendant honestly believed; but whether he honestly wrote: a very different thing; including, indeed, the other, but also including some-

\* 2 Fost. & Finlason, 524, 525.

thing more—the absence of that reckless spirit which is legal malice, which would partly depend upon belief.

It is true that in one particular passage the Lord Chief Justice spoke of honest belief as the test, and the learned reporter seemed at the time to have distrusted this passage (which certainly by itself might have a tendency to mislead), and hence added a note referring to the general scope of the summing up; which evidently implies and assumes that the occasion was privileged; that is, that there was a lawful occasion to discuss the particular matter out of which the imputation naturally arose (viz., whether the plaintiff's predilections and principles made it safe for him to have the care of the papers), and then the question would be whether he wrote in the honest exercise of the right of free discussion of that matter; and, as the great test of that, whether he honestly believed in the conclusion he drew, and the opinion he expressed. The reporter, therefore, was wrong when he suggested in a note that this opinion or belief must be reasonable; that would be restricting the right of discussion within the limits of the opinion of the jury on the subject of discussion. The question was whether the writer was honestly exercising his right of discussion on the particular matter; and if so, and if he wrote honestly, then it did not matter that his opinions might appear not reasonable unless so unreasonable or irrational as to be reckless; which is, perhaps, what the reporter meant, for the law does not deem that to be honest which is so unreasonable as to be irrational or reckless.

Let us see how these principles have been illustrated in some of the more recent cases.

In *Paris v. Levy*, the plaintiff had published a handbill in the way of his trade, and the defendant, the editor of a newspaper, in commenting upon it, said that it incited servants to rob their masters. There was no plea of justification. It must be taken, therefore, as admitted, that the handbill was not dishonest, and had not the intention or the effect

ascribed to it. But upon the general issue Lord Chief Justice Erle thus directed the jury :

“ The plaintiff is not entitled to recover your verdict unless he establishes that the defendant was actuated by malice. The law does not require that the plaintiff should show personal malice or illwill, but that the defamatory observations were published without any of those causes which the law considers will justify them. Such causes excuse the publication, because they show that the party was not actuated by any corrupt or malicious motive in saying that which tends to defame the character of another.”

Now, observe, the Lord Chief Justice treats the occasion as privileged, and as rebutting the inference of malice.

“ There are many occasions well known to the law which justify the use of defamatory words on the ground that malice is negatived. In criticism on matters which have been published by the complaining party, Lord Ellenborough laid down that a publication is not a libel which has for its object not to injure the reputation of another, but to censure what is hostile to morality. If you give, therefore, your verdict for the defendant, it must be on the principle so laid down.”

Not on the ground that the plaintiff thought the handbill had that tendency, for that would be a justification which should be pleaded; but on the ground that the defendant might without malice, that is, not so unfairly as to amount to recklessness, infer that it had that tendency. This is plainly the fair effect of the whole of what the Lord Chief Justice said in his ruling on that case, and any isolated expressions he dropped as to “ well-founded,” must be construed with reference to, and consistently with, the principle he laid down.

The Lord Chief Justice went on :—

“ In the article in which the tendency to incite servants to dishonesty is imputed, I can see no word against the plaintiff as a private individual, or going beyond the handbill ; but if Paris puts forward a handbill and draws public attention to it, which, in the

opinion of the editor, is most dangerous as an incitement to dishonesty, it may be that he will be able to excuse before a jury the remarks he has made if in their judgment they are well-founded and applicable to it."

That is, not true, nor strictly well-founded (for if so, that would be a ground of justification, and not available upon the general issue), but fairly "applicable" to it, in the sense of being relevant thereto and fairly arising out of it; and naturally, (whether truly and justly, or not) suggesting themselves to the writer in the honest exercise of his right or privilege as a public writer, not writing maliciously, but really with an honest animus, and with some fair colour for his censuring and his strictures. Taking the whole direction together, it is clear that the Lord Chief Justice did not mean that the right was restricted to such observations as the jury might think fair.

That case was confirmed in *banco*; and Mr. Justice Byles said — making the test the public or private nature of the matter commented on:—

"The remarks were privileged, if the jury thought that they were a fair and reasonable criticism, not reflecting on the private character of the plaintiff. The question is, do they go beyond the limits sanctioned by law, and cast a reflection on the private character of the plaintiff."

That is, not his personal character, (for any imputation on character, whether in public or private matters, must be personal), but private character, that is, character in private matters, not connected with or arising out of the public matter commented upon. Then the learned judge, delivering the unanimous judgment of the Court, quotes the principal passage from the direction of Chief Justice Erle, as above given from the Report quoted, and declares it to be correct. And Mr. Justice Keating distinctly declares the publication "privileged, as it did not attack private character." \*

\* 30 L. J. C. P., 11, 12, 13.

The doctrine was again laid down by that eminent Judge, Mr. Justice Hill, in *Wilson v. Reed*,\* where he thus founded it upon the real legal principle.

“Any publication which exposes an individual to hatred, contempt, or ridicule, being published without lawful excuse, is a libel. . . . But it is lawful to publish in the columns of a public journal matters of public interest, provided it be done *bonâ fide*, without actual malice, or the unnecessary making of personal imputations upon any individual.”

And in that case it was plainly unnecessary and voluntary, for the plaintiff had published nothing, nor had he done any thing publicly; and the imputation was one of corrupt conduct in the being bribed to give a certain vote at an election. The vote was public, and so the matter was of public interest. The supposed corruption was private, and a mere bare assertion and voluntary suggestion of the defendant, not founded on any public conduct or published words of the plaintiff.

But the learned judge does not say that personal imputation can never be exercised as a part of “fair comment.” He only says that it cannot be excused where it is irrelevant or purely invented, and not necessarily or naturally arising out of anything publicly said or done by the plaintiff. And, accordingly, we observe that the learned reporter appends this note :

“In the above case it will be seen that the direction proceeded upon the same principle *Paris v. Levy*. There the alleged libel consisted of comments, the jury thought just, on a publication by the plaintiff. Here, on the other hand, the defendants had, without necessity, published statements as to the private conduct of the plaintiff.”

But the ruling of Mr. Justice Hill is plainly to the effect that the occasion of the discussion of a matter of a public nature does excuse such defamatory matter as naturally arises out of

\* 1 Fost. & Finlason, 149.



such discussion. The very distinction between public and private matter implies this. So in a case\* where the publisher of a newspaper charged the plaintiff with having shown, in prior publications "a motive which had overcome truth and honesty," and there was no justification, and only the general issue, Chief Justice Erle thus laid down the law with admirable accuracy and fidelity, and in the clear light of principle :

"This is an action which is not maintainable without malice, which means in law any wrong motive. Nothing is more important than to draw the line duly between fair discussion for the advancement of truth, and publications for the aspersion of personal character. The case of a servant is only an instance illustrating the legal principle upon which defamatory words may be justified by the occasion. This is a kind of case which is more rare, but is reducible to the same general principle, when the plaintiff and the defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff first had recourse to the press, and made the matter public ; it is in such a case important to see if malice is made out against the party sued ; or if he has published only what he believed to be required for the interests of truth. If you are of opinion, upon the whole, that the defendant wrote what he did for the purpose of maintaining the truth sincerely, having that object in view, without any corrupt motive, and that the language he used, even although exaggerated, was prompted by a desire to maintain the truth, then you are at liberty to find the defendant not guilty."

The Chief Justice, it will be seen, treats the occasion as privileged, and the test he applies as to whether the publication of the particular expression was privileged, or whether they were not so reckless as to show malice, is as follows :

"Are the expressions used by the defendant in commenting upon the plaintiff's publication so intemperate as to satisfy you that he was actuated by an improper motive? Or are they such as under

\* *Hobbs v. Wilkinson*, 1 Fost. and Finlason.

the circumstances were not too strong? Was there not ground for saying what he did? Was not that a natural, though a rash, conclusion? Was it not a natural desire to correct a misrepresentation of fact, or was it the malicious and improper motive of injuring the plaintiff? \* In the latter case, find for the plaintiff; in the other case, for the defendant."

That is, the matter being public in its nature, the test of liability is made malice, and the test of malice excess in violence or virulence.

It has been seen that there is a close connexion between the rights of public discussion exercised orally and in the press. They are, indeed, only different forms or modes of exercise of the same right. The judges have more than once observed that there is no peculiar privilege to newspaper writers, and the right of free discussion of public matters is common to all men. No doubt this is so, and of course it follows that the same limits are to be assigned to the right of oral and of written discussion on public matters. Now, the very judge who tried *Campbell v. Spottiswoode* tried a case of oral exercise of the right of free discussion, in which he clearly and boldly laid down the law as we have here asserted it to be, viz., that the only limit to the exercise of the right is such excess as would be evidence of malice. In that case,† the defendant at a public meeting charged the plaintiff with having misappropriated the funds of the parish and applied them to his private use. It was contended that the occasion was protected, and that the words were privileged.‡ The Lord Chief Justice ruled thus:—

\* *Hobbs v. Wilkinson*, 1 Fost. and Finlason, Rep. 610.

† *George v. Goddard*, 2 Fost. and Finlason, 689.

‡ Words having been spoken at a meeting for the election of an overseer, imputing to a person put up for re-election that he had misappropriated parish moneys while holding the office before:—*Held*, that the occasion was privileged, but that whether the words were so, would depend, not merely on whether they were wilfully false, but whether on the face of them they were so far beyond the occasion that the jury might fairly infer the occasion was merely *made use* of for the purpose of personal malice.—*George v. Goddard*, 2 Fost. and Finlason.

“COCKBURN, C. J.—I shall tell the jury that the occasion was privileged; but that the statement, though made on such occasion, will be unprivileged, if the making it was a malicious abuse of the occasion. They have a right to ascertain the real meaning and intention of the plaintiff in the words complained of, notwithstanding other words of courtesy and kindness.

“If the defendant simply meant to censure the conduct of the plaintiff as overseer, in relation to the law proceedings, and to the money borrowed for them, and repaid out of the rates, his statement was privileged by the occasion. If, on the other hand, he availed himself of the opportunity afforded him, by the meeting of the rate-payers, to bring forward a charge against the plaintiff, not merely of exceeding his duty, but of corruptly violating it, by applying the parish money to his own private purposes, the statement was not privileged, nor was it protected by the occasion. If the language of the defendant was entirely disproportioned to the circumstances under which he would be privileged by the occasion, the jury would be justified, I think, in inferring malicious motives, for they only would be the motives which would prompt such language; but, if it be plain to the jury that the defendant's language described only the excess of duty, without imputing private corruption, then I shall tell them the occasion and statement were privileged.”

It follows from the above extract, if a public writer had, upon a publication by the plaintiff of a letter setting forth the matter, commented upon it to the effect of the above libel, it would have been equally protected, and within precisely the same limits.

The only distinction would be, that as the privilege of oral discussion would be restricted to a public meeting at which the matter might naturally, that is, fairly arise, so the privilege of printed discussion would in like manner be limited to the occasion of some publication in which it would fairly and naturally arise, that is, either an official or legal publication, or a publication by the plaintiff himself of some matter out of which the imputation might fairly or naturally arise. It would not be competent to a public speaker at a meeting

which had nothing to do with the matter to enter into a discussion of it. Neither would it be competent to a public writer, without waiting for any publication by the plaintiff, or some lawful authority, of some matter which made it relevant, of his own mere motion, to raise the question and publish the imputation. In either case the occasion must in that sense fairly, that is, naturally arise; but when it does so it is protected provided there is no excess.

This is the true and only indication of cases like *Davidson v. Duncan*, and *Popham v. Pickburn*, in which it has been held that publication of a report of defamatory observations at a vestry meeting, or of defamatory comments on a report presented at such meeting were not protected. The publication in each case was to all the world; and the words uttered at the vestry in one case, and the report presented to the vestry in the other, were publications limited to the vestry in each case, and such as would not fairly warrant a publication to the world. That was the real ground of the decision in each case. It was not held (as was supposed in the first case) that a report of defamatory observations at a public meeting could not be protected, for what it would be competent to a public speaker to say to all the world (could they be present at a public meeting), it would be surely competent to a public writer to publish to all the world in a newspaper. But neither the one right nor the other would extend to matter limited to a particular body or vestry.

It is to be observed, however, that even a matter arising before a particular body may have a public interest, such as will make the whole of it fair subject of public comment. This was one great point determined in the case of *Seymour v. Butterworth*, as to an inquiry before the Benchers of an Inn. Another point, and quite as important, was there determined, namely, that even the private character and conduct of a public man may be fit subject of public discussion, even as to matters not involving moral misconduct, as, for instance, debt. In that case, the able counsel for the plaintiff, Mr. Lush,

than whom no one could be more safely relied on for a fair and correct statement of the law, seems only to have relied on the allusions to private conduct, and on evidence of malice. He said :

“I shall ask whether it is a fair and legitimate comment upon a man’s public career, or whether it is not a malignant and studied attack upon his professional life, dictated by private ends. I am here not to say one word against the liberty of the press ; on the contrary, I hold that, as Englishmen, we have no greater social right than the right of free discussion ; still it is necessary for its very maintenance that it should be guarded and preserved within its proper province. I admit that in the newspapers the conduct of every public man, from the highest in the realm down to the lowest, may be freely discussed. The conduct of any member of Parliament in his public capacity may be discussed ; nay, the very investigation in which we are now engaged may be fully criticised. But men must not go beyond that : if they invade the sanctity of private life, and groundlessly impute corruption in the relations of that private life, then the liberty of the press is abused, and the interference of the law may be justly claimed. If this publication had contented itself with a mere criticism upon Mr. Seymour’s Parliamentary conduct, if *bonâ fide*, however severe it may have been, it would not be liable to an action ; and the same is true of similar criticisms upon his professional career. But rumours, mere rumours of charges which had taken no fixed shape, such as these, no man had any right to embody in a published attack against any man. Nevertheless, this writer has done so, and he has chosen to embody every rumour which he found afloat in his indictment against Mr. Seymour. I ask you to consider, is it not manifest that the man who penned this article was influenced from first to last by personal motives to endeavour to crush Mr. Seymour, socially, politically, and professionally.” \*

That is to say, (as we collect,) the learned counsel did not consider that his client could complain of the strictures, however severe, on his conduct in Parliament, but only of the embodiment of rumours as to the charges of private mis-

\* Foster & Finlason. .

conduct, the Benchers' report not having been generally published.

He appears to have admitted that the act would have been fair subject of comment ; and as to that, relied on evidence of motive. This was putting the question, as we conceive, quite correctly in point of law, as to the form in which it arose. The Lord Chief Justice, however, ruled, and as we conceive rightly held, that the private conduct of the plaintiff, in so far as it went to show whether he was a fit and proper man for judicial functions, was fair subject of comment ; and that, for that reason, the inquiry before the Benchers, though a purely domestic forum, was also fit subject of public discussion. He said :

“No doubt the stinging part of the article was that which related to the charges which had been made the subject of inquiry by the Benchers, and he differed from the learned counsel for the plaintiff, when it was contended that under no circumstances could private conduct form a proper subject of observation for a public writer. Mr. Seymour did not occupy the position of a private individual, nor was it as a private individual that his conduct was made the matter of inquiry. Mr. Seymour was a barrister, and, as such, was subject to the domestic forum of the Benchers. It was beyond dispute that if the conduct of a member of an Inn of Court was such as to be unworthy of a gentleman, he was within the jurisdiction of the Benchers of his Inn. In the same way as officers of the army were subject to investigation when charges were made against them of conduct unbecoming officers and gentlemen, barristers were subject to the jurisdiction of the Benchers if their conduct was unbecoming the profession and unbecoming gentlemen. The Benchers exercised their jurisdiction partly for the protection of the profession and partly for the protection of the public—for the protection of the profession, that it might not be disgraced by having enrolled among its members those who dishonoured and discredited it ; and for the protection of the public, that their confidence in the rank of the barrister, being a sufficient test of the trustworthiness and honour of each individual member of the Bar, might not be misled and abused.”

And, upon this, the most important part of the case, the

Lord Chief Justice appears also to have held that the comments made were within the privilege ; though it is not quite so clear whether he meant to leave it to the jury to say if they were fair ; or to tell them that in his opinion there was no evidence of excess or of malice—which latter we conceive would be the proper way of putting it.

“The writer added no facts of his own, and was not responsible for the facts. A tribunal of competent authority, the writer said, had made public a sentence reflecting upon a public man, and that man, upon whom censure was passed, had taken no step, either by publishing the evidence or by appeal to a superior jurisdiction, effectually to vindicate himself from the sentence. Surely it was a fit subject for public animadversion, whether the person censured was fit to occupy the position of barrister, judge, and member of Parliament. There was no attempt to add any facts, and the writer, proceeding to make comments, said to the effect that, until Mr. Seymour took the course which was open to him, of bringing before the public the whole of the evidence which had been taken, and of which he was in possession, so long there would be nothing but his assertion to meet the sentence, and so long the writer would take the liberty to say the sentence was well founded, and the facts upon which it proceeded incontestable.”

We may observe, however (as this appears to imply that a public writer can draw no inferences), that the writer drew an inference, and a rather strong one ! but which we conceive he was quite warranted in drawing, as to the course which the Benchers in his opinion ought to have taken. And we protest against the implication that a public writer can never add facts, either by way of inference from that which is fit subject of comment, or from those materials along with other public facts. It is confining the right of discussion within very narrow limits to restrict it to mere criticism or comment on what may appear within the four corners of a particular document or on the face of particular papers. There is the question of the time at which it is put forth ; the relation which it has to past, or present, or impending circumstances,

or to past declarations or notorious obligations of the party whose acts are the subject of discussion. All this, however, must depend, of course, upon the particular circumstances of each case. The great point for which we contend is, that within the limits of the fair scope and subject of comment, a public writer has an immunity, so long as he is in the honest exercise of his right of public discussion. If this was not clearly asserted in the case, it seems to have been implied, and at all events was not denied.

The test is made the honest exercise of the right of free discussion as opposed to an abusive pretence of its exercise. In that sense the word was used by Lord Chief Justice Cockburn himself in the case of *Seymour v. Butterworth*,\* where he thus laid down the law :

“It is not disputed that the public conduct of a public man may be discussed with the fullest freedom. It may be made the subject of hostile criticism and of hostile animadversions, provided the language of the writer is kept within the limits of an honest intention to discharge a public duty, and not made a means of promulgating slanderous and malicious accusations.”

That again is, it will be seen, accurately in accordance with the authorities. And the Lord Chief Justice went on in that case, speaking of our strictures on a corrupt system of parliamentary patronage :

“No doubt it may be deemed objectionable to have a number of those who should be free and independent representatives of the people always under a sense of favour and obligation to the Government of the day. Not only was this a fair matter for discussion, and within the province of a public writer ; but a public writer was fairly entitled, if, in his opinion, such a course of proceeding is detrimental to the independence of the Bar, to the independence of Parliament, and to the independence of the representatives of the people, to animadvert with severity upon the conduct of those who gave and of those who received such patronage.”

And though his Lordship seemed to qualify this as to the expression of opinion upon any particular instance—

\* 3 Foster & Finlason.



“But if he went beyond that, and asserted that a member of Parliament had bargained to sell his vote upon a corrupt contract, or that a member would not have voted or spoken as he did but for a corrupt understanding that he should receive a reward, it became a serious charge, and one which no man writing, whether in public or private, should venture to make against another ;”

—yet he does not say that it might not be privileged by the right of free discussion ; and of course whether it were so or not must depend upon the subject-matter of comment and the materials or grounds of inference it afforded in the particular case. And we confess that in that case we think the incidents alluded to were fit subjects of comment as to the connexion between the interviews with the Government and the vote on any particular occasion. What was the case of *Campbell v. Spottiswoode* ?

Dr. Campbell, the plaintiff, was editor and part proprietor of a religious newspaper, the *Ensign and Standard*. He had published a series of letters to Prince Albert, with the avowed object and effect of raising the circulation of those papers, as he said, by 100,000. He proposed to publish in his papers a series of letters on Chinese Missions ; and to invite the religious public to subscribe for at least an equal number of copies of his paper containing those letters, for the purpose of gratuitous distribution, in order, as he said, to promote the cause of Chinese Missions. To stimulate these subscriptions, he put forward announcements and appeals, of which these are specimens. Their scope is, it will be seen, simply this : to solicit public subscriptions to his paper, on the score of his own anxiety for the souls of the heathen.

“Co-operation is earnestly invited to aid in sending forth on all sides arguments and appeals calculated to awaken compassion for the lost millions of the race of China. . . . Fathers ! friends of the heathen, I am most anxious to enlist your good offices on behalf of four hundred millions of perishing souls. What zeal, what liberality are not demanded by the claims of four hundred millions of perishing souls.”

Such is the "matchless cause" for which he is moved to write a "Series of Letters." But this will be of no use unless circulated. And in order that they may be circulated, he asks a large amount of subscriptions to his paper containing them. That is, entirely on the score of the zeal which is consuming him; and which, of course, is to inspire these "Letters."

"The good to be anticipated from these Letters must depend on the extent of their circulation." . . . . "It is necessary that they should receive the widest possible diffusion." . . . . "Surely we need not despair of this; the promotion of the eternal welfare of one-third of the human race may well awaken the deepest compassion, and call forth the utmost energy of the remainder." "There is but one way of securing a really efficient circulation, and that is, for our generous friends to take the matter into their own hands. If they order direct from the office a number of copies for distribution, who can tell the benefit that may arise to the great cause! This is the first step," (*i. e.* the subscription,) "but to complete it, demands another (the distribution), which requires the good offices of our excellent publisher, which will be cheerfully rendered. Our friends have, therefore, only to transmit to him contributions for the purpose."

That is, they were to send the publisher the money, and rely on him to distribute the copies. Thus unlimited confidence was to be placed both in editor and publisher.

Speaking of his former Letters, the Doctor says:

"My friends, the friends of the truth as it is in Jesus, generously enabled me, through their subscriptions, to circulate in proper quarters 100,000 copies, which, it is calculated, have been more or less perused by one million of people. In the present case, however, if the movement shall be in any way proportioned to the theme, five times that number would be required!"

That is, 500,000 copies circulated, and perused by 5,000,000 of people! Such a circulation would, if secured, have made the *British Standard* wave indeed over a wide expanse of

moral dominion; and made the Doctor owner of one of the finest newspaper properties in this country. How far he ultimately succeeded, is not possible to say. After he had gone on some time, he informed his admirers that, "The free circulation had amounted to 22,000 copies;" that is, that number were subscribed for weekly (as we understand), to be circulated at his discretion. A double advantage; first, they are paid for by the subscribers; then he is at liberty to distribute them as he pleases; and every one of them is an advertiser of his paper, and enhances the value of his property.

Thus the Doctor represents it as the reason why the "friends of the heathen" should assist him, that he is burning with anxiety to enlist their aid on behalf of the perishing heathen. That, he solemnly assures them, is his object. That is his sole motive. He challenges attention to it. He invites scrutiny of it. He puts it in the van. He urges it as his great argument. He enlarges on the idea. He declares it overwhelms him.

"The idea of one-third of the human race seems to confound and overwhelm the mind."

Yet so intense is his zeal, that he addresses himself to the mighty task.

"As much as in me lies, therefore, I feel called upon to use the literary facilities so largely placed under my control to further the sublime enterprise."

And then he points out that this is only one mean to the end, and explains how he requires money.

"The Letters must be circulated and read, and for this I am wholly dependent on the good offices of the friends of the heathen."

The effect of these appeals by the Doctor, in person, was aided from time to time by the publication of letters, or extracts from letters, of pious persons who had been stimulated by these appeals to subscribe; all in the same style, and using

the same phraseology, "The Editor's admirable Letters," "The all-important subject," "May the Editor be abundantly strengthened and encouraged in this new effort for the glory of God, and the best interests of the perishing heathen." And again, "I would encourage Dr. Campbell in all his abounding labours of love. He is an honour to his country and a benefactor of man." And so on. Thus, after himself professing his overwhelming anxiety for the souls of the perishing heathen, as a reason for other people subscribing their money for the circulation of his paper—he introduces other, for the most part anonymous, writers, expressing their high admiration of his matchless zeal and "labours of love," and by their example seeks to invite others to a like liberality. "Beyond any man of his time he has displayed an intense and unquenchable zeal on behalf of China." And then in another place, by way of stimulating the liberality of friends of the heathen, he points to the munificent subscription of that gentleman. And then he proffers the aid of his publisher to distribute the papers,

"deeming nothing too much to further a cause so glorious; a cause which involves obedience to the Divine commands, the salvation of men, and the glory of God."

And he winds up this powerful appeal by

"commending this matter to the serious attention of the friends of the heathen, and earnestly soliciting their good offices."

That is, he asks their subscriptions on the score of his sincere zeal for the conversion of the heathen. We do not doubt it in the least. But then we say that by thus putting it before the public he made it a fit and fair subject for public comment, and could not complain if it was suggested, that it was not the sole motive.

Now, we repeat, and we declare sincerely, we do not doubt the Doctor's sincerity. But what we say is, that by taking this course, he made his motives and his aims, and the whole moral character of his proceeding, fit subject of public

stricture and public commentary. We say the whole of it was so. Not (as the Lord Chief Justice would have it) only a part of it. Not merely its feasibility, or its very probability of success, but its real aim, and motive, and end. Not merely its effect, but its object. Not merely the means proposed, but the moral character of the agencies and means employed, and the incitements and inducements held out. Because the whole depended upon the faith felt in the Doctor's anxiety for the souls of the heathen, as the sole motive he had in view. If there was any admixture of any other and more selfish motive, if the good of the paper was in the least in view, a public writer had a fair right to object to that admixture, and denounce it.

We say that there was a fair occasion for the discussion of every part of the materials thus presented for discussion; not merely the feasibility of the proposed plan, but the moral character of the means adopted for carrying it out, and especially the publication of letters, "all bearing the marks of the same style," all breathing such a tone of eulogy on the projector of the plan, all pointing to the most implicit confidence in him on account of his professed and assumed anxiety for the heathen; we say that all this, and especially the latter, the reality and genuineness of the feeling thus put forth as the moving principle of the whole, was fair subject of public discussion, with a special view to the question whether on the whole it was not probable that, in the language of the Lord Chief Justice himself, the collateral advantage to the paper was not present to the plaintiff's mind, and had not some influence upon him, and whether this probability did not raise a powerful argument against the moral propriety of the means thus adopted, and of this suspicious union between the secular and the spiritual.

We say that the whole of this was fair subject of discussion, and that there was a privileged occasion to a public writer to discuss all that was then set before the public, and the discussion of any part of it. And that the question as

to the limit of his right of discussion was not whether these materials might fairly, in the judgment of judge or jury, support any inference he drew therefrom, or any imputations he founded thereon, but whether they might not naturally arise in the mind of the writer, when honestly engaged in the discussion of these materials, or whether, on these materials, they might naturally enough suggest themselves to his mind in discussing them. If so, then we submit that as the right of discussion embraced them, so the privilege applied to the imputations relating to them, and that there would be no other question except whether there was in the manner of the discussion any evidence that there was not the honest exercise of the right, but an indulgence in reckless defamation which would be evidence of malice.

What were the imputations in the present case? We extract the material passages in the alleged libel with the notes of the learned reporters, who, it will be seen, consider it came strictly within the limits of fair comment.

“The Doctor refers frequently to Mr. Thompson as his authority, so frequently that we must own to having had a transitory suspicion that Mr. Thompson was nothing more than another Mrs. Harris, and to believe, with Mrs. Gamp’s acquaintance, that ‘there never was no such person.’ But as Mr. Thompson’s name is down for 5,000 copies of the *Ensign*, we must accept his identity as fully proved,\* and we hope the publisher of the *Ensign* is equally satisfied on the point. Certain it is, that Mr. Thompson knows more about China than anybody else in England.

“To spread the knowledge of the Gospel in China would be a good and an excellent thing, and worthy of all praise and encouragement; but to make such a work a mere pretext for puffing an obscure newspaper into circulation, is a most scandalous and flagitious act, and it is this act, we fear, we must charge against Dr. Campbell.†

\* So that here was a distinct disclaimer, as regards this name, of any idea of its being fictitious.

† This gives the key to the real meaning of the whole article, that the making out that the advancement of Christian missions was an object to be attained or promoted by subscribing to the plaintiff’s paper was a mere

Buy the letters, and save the heathen. About twenty-five letters will be 'required;' they must be circulated and read, and for this 'I am wholly dependent on the good offices of the friends of the heathen.' There is no disguise in all this. Letters from correspondents, all bearing the mark of one hand,\* put the matter on a very simple basis.

"There have been many dodges tried to make a losing paper 'go,' but it remained for a leader in the Nonconformist body to represent the weekly subscription as an act of religious duty.† Moreover, the well-known device is resorted to of publishing lists of subscribers, the authenticity of which the public have, to say the least, no means of checking.‡ 'R. G.' takes 240 copies; 'A London Minister,' 120; 'An Old Soldier,' 100; and so on. Few readers, we imagine, will have any doubt in their minds as to who is the 'Old Soldier.'§

"Whatever may be the private views of the editor of the *Ensign*, there can be no question that his followers are sincere enough in the confidence they repose in his plan. It must be a very happy thing to be gifted with so large a stock of faith. If this temper of mind should lay its possessor open occasionally to the beguilements of an impostor,|| more than an equivalent is provided in the freedom from doubts and suspicions and the sense of security that it confers. No doubt it is deplorable to find an ignorant credulity manifested among a class of the community entitled, on many grounds, to respect; but now and then this very credulity may be turned to

pretext, "a scandalous and flagitious act," and an "imposture;" not that the imposture lay in fabricated subscriptions or fictitious letters, save only as a matter of mere inference arising from the similarity of tone or style.

\* This is the only passage which at all suggests a fabrication of letters, and it is done studiously by way of critical inference from the style of the letters, not by way of independent suggestion. The distinction is all-important. Why may not a public writer infer from the similarity of style in different letters or articles that they are from the same hand? There is no suggestion of a fraudulent intent in this passage.

† This is the "dodge" or "imposture" aimed at all through; *ut supra*.

‡ Here it is not at all suggested that they are not authentic, and the "device" is in publishing lists of subscriptions, equally a "device" whether real or not real.

§ This is evidently what the Lord Chief Justice called "mere banter," and meant that the Doctor was an "old soldier," i. e., an experienced hand in such matters and in the practising of such "dodges" and "devices" as above alluded to, not that he forged the letter signed "An Old Soldier."

|| This alludes to the nature of the plaintiff's "plan," *ut supra*, and has no connexion with a suggestion as to forged letters or with any other imposture than as implied in the nature of his proposal or plan.

good account.\* Dr. Campbell is just now making use of it for a very practical purpose,† and to-morrow some other religious speculator will cry his wares in the name of Heaven, and the mob will hasten to deck him out in purple and fine linen. When Dr. Campbell has finished his 'Chinese Letters' he will be a greater simpleton than we take him for if he does not force off another 100,000 copies of his paper by launching a fresh series of thunderbolts against the powers of darkness. In the meanwhile, there can be not doubt that he is making a very good thing indeed of the spiritual wants of the Chinese."‡

Now we confess we could scarcely ourselves conceive of a case more clearly within the fair limits of free discussion. And it was apparent that the plaintiff's advisers felt that if there were nothing but comments on and inferences from his own publications, the article was within these limits. For from the first they sought to fasten on the writer the responsibility of distinct and independent assertions or statements of his own, not by way of inference or observation. Thus :

"The plaintiff's attorney wrote to the *Saturday Review* to desire that an 'ample apology' should be inserted, with a declaration that there was reason to believe that 'the charges' made against him were utterly unfounded, such apology to be sent to him for approval, and to appear in the next number, in the same type as the libel, and in a similar position. The defendant's attorney wrote to request that the passages charged as libellous might be specified. The plaintiff's attorney in reply wrote that there could be no difficulty in discovering what those passages were, and that if his request were not complied with in the course of the morrow, he should take proceedings, for he could not submit to the imputation of being an 'impostor,' or 'guilty of scandalous and flagitious conduct,' " and he pointed in particular at the supposed imputation of fabricating letters, &c. "The defendant's attorney, in answer, wrote, 'It appears to us, from the context, that the words complained of are used

\* This refers to the scandalous and flagitious act first referred to, of representing the subscription to the paper as an act of religious duty.

† That is, by representing it as a religious duty.

‡ That is, by representing it as a religious duty to take his paper.



merely as part of a criticism on a newspaper article, and are not intended to attack Dr. Campbell's character. If you will point out any statements of matter of fact which you consider erroneous, it shall be corrected in the *Review*.' " (This was understating the case for the defendant, for his right was not merely criticism, but free discussion.) "The plaintiff's attorney, in reply, suggested that he and the publisher should meet the defendant's attorney, with all the books and documents, and satisfy them that the supposed imputations of fraud were erroneous. The defendant's attorney, in reply, denied in effect that there were any such imputations, and said that it would be better to point out in writing what was complained of. The reply to this on the part of the plaintiff's attorney was the writ in this action, in acknowledging which the defendant's attorney declared his regret that an opportunity had not been afforded of correcting any erroneous statement of matter of fact."

The plaintiff's case, however, at the trial was conducted on the assumption which had been made from the outset that the article made distinct and independent statements of matter of fact against the plaintiff, and his case at the trial was rested entirely on the view that the article imputed to him fabricated letters and fictitious subscription lists, and the plaintiff was himself called to disprove this, and the persons referred to were called and proved their own existence and the reality of their letters. In particular, Mr. Thompson, of Prior Park, the husband of the lady alluded to, was called as a witness, and it turned out that he was a friend of the plaintiff, and had promoted the "letters."

Now in no view was this evidence admissible, and we are surprised that it should have been received. There was no justification, and if there were any imputations in the way of direct and independent assertions, they must be taken to be untrue in fact. And as to malice, this was an action not against the writer, but the publisher; and evidence of malice in the former would be irrelevant in an action against the latter; added to which, mere evidence that the supposed

imputations were untrue would be no evidence of malice against either. And if it were meant to connect this evidence with the refusal to insert a contradiction or explanation, that was after the publication; and though it might, if brought home to the writer, have been evidence of precedent malice in him, it could not be so in an action against the publisher.

The effect of admitting this evidence was, of course, to produce the impression that there were independent statements, by the writer, of matters of fact, and not mere comments on matters arising out of the plaintiff's own propositions; and no doubt there were suggestions of inferences of fact, as well as of opinion, at all events in the construction which the Lord Chief Justice and the jury put upon the article; but on the principles we have laid down that would make no difference, because the right of free discussion would extend to the deduction of inferences of fact or the suggestion of matters of fact, provided they were within the scope of the subject-matter of discussion. The great question, then, was, what was the scope and subject of discussion; and that depends on the nature of the plaintiff's publications. But some how the attention of the Lord Chief Justice was drawn off from them, and fixed upon a totally different point—the question of actual belief in the writer; of the truth and fairness of his imputations.

To understand and do justice to the direction of the Lord Chief Justice, it is necessary to mark well the course which the case took, and above all the ground on which the defence was put, or understood to be put, at the trial. He was reminded of *Turnbull v. Bird*; but he was asked, in a general way, to put the question to the jury whether the writer honestly believed what he wrote. Now in the first place it is plain that, as a question of actual belief, there was no evidence on which he could put that question to the jury, especially as this was an action, not as in *Turnbull v. Bird* against the writer, but against the publisher; and the writer was not—perhaps could not be—called to prove his belief. And next as a question of

probable or reasonable ground for belief; that would not be material except as an ingredient in the question of malice; and that would not arise until the prior question was decided; which was, as we have seen, one of law—whether there was anything which could fairly form the subject of the discussion, and be any occasion for the imputations complained of.

The defence upheld in *Turnbull v. Bird*, and probably intended to be set up in *Campbell v. Spottiswoode*, was, that there was an occasion for the discussion of the very subject-matter of the particular imputation; and that, therefore, there was a lawful occasion and excuse for defamatory imputations naturally arising out of the honest exercise of the right of discussion thereon; and that, in the absence of personal malice, those imputations were protected, provided they were made in the honest exercise of that right; the test of which in that case was that they were honestly believed. So it was, there, all the prior points being established, and the action being against the writer, and the question of actual belief raised by evidence. That was a widely different thing from holding that the imputation was protected merely because honestly believed, which would not even show that they were honestly made, as they might have been made maliciously. All, however, turned on whether there was subject-matter for the particular imputations.

The Lord Chief Justice, as we conceive, rightly considered it to be for him to lay down as matter of law what was fit subject for discussion or fair subject of comment; and it would have been perfectly competent to him to tell the jury that such and such matters—not fairly arising out of the Doctor's publications—were not fit or fair subject of comment at all, whether fair or unfair, because not fairly or naturally arising out of the plaintiff's publications, and so not within the proper scope of public discussion at all. For it is always for the judge to define the limits of a privileged occasion. And this, we presume, he intended to do

when he laid it down, in effect, that it was only, in his opinion, the nature and character of the proposals, which was fit subject of public comment, because it was that alone, which arose on the face of the plaintiff's publications. We venture, however, to think either that the Lord Chief Justice erred in allowing far too narrow a scope to the subject of comment, as disclosed in these publications, or that he confounded the question of what was fair subject of comment with the very different question, what is fair comment?

The Lord Chief Justice thus defined the limits of fair comment, on the occasion :

“It was perfectly lawful for a public writer to say that it was an idle scheme, that it was a delusion to suppose that, by forcing the papers into circulation by free distribution, the great cause of missions would be promoted, and, in short, to denounce the whole scheme as pernicious and delusive. And if you think that this is all which has really been done in this case, then it is within the fair and legitimate scope of criticism, and then you ought to find your verdict for the defendant. But the question is whether the writer has not gone beyond these limits, and imputed to Dr. Campbell not merely that he has proposed a delusive and mischievous scheme, but that he has done so with the sordid motive of abusing the confidence of the public on subjects the most sacred, for the pitiful purpose of increasing the subscriptions to his newspaper. If you think so, then the case assumes a different character.”

That is, then they are not to find for the defendant, because then the imputation would go beyond the limits which the Lord Chief Justice allowed to free discussion.

The Lord Chief Justice was no doubt right in taking it upon him to define the limits of the right of public discussion on the materials put forth, for it is always for the judge to define and declare a privileged occasion. And of course this would be in effect to direct a verdict for the plaintiff, subject to the opinion of the jury, on the question, libel or no libel, which is always for them, and what the Lord Chief

Justice must be supposed to have laid down as matter of law, was, that there was no lawful excuse or occasion for the imputations supposed to have been made. No doubt that was for him; because lawful excuse is for the judge, while libel or no libel is for the jury. Still there is so much the air of an appeal to the jury on the question, and there is so much of observation on the fairness of the imputations, that we have some suspicion that the Lord Chief Justice may have either confounded the question, of what was the fair subject of discussion, with the question whether the imputations were fair, or may have supposed that the former question would depend on whether the imputations were fair and well founded; which we conceive was neither for the Court nor for the jury, but for the writer—assuming him to have a right for the discussion of the particular matter, and to have honestly exercised his right, because then he would, we conceive, have a privilege for any imputations not so unfair as to be malicious. The Court *in banco*, beyond all doubt, gave countenance to the idea that the inferences or imputations must be fair or well founded; which supports our impression that the Lord Chief Justice so meant it, though that leaves it in great doubt whether he meant that for the jury, or decided it himself. He certainly did not leave it to the jury; and if he decided it himself as matter of law, then it could only have been because he supposed that the right of discussion would depend, not only on whether the particular matters would naturally arise out of the discussion of the materials put forth, but would fairly, in his judgment, support the particular imputations; which we conceive to be quite erroneous.

The question for the judge in such cases, we submit, is simply to say whether, as matter of law, the imputations are so far connected with, and so far arise out of any of the subjects of discussion, that a writer might honestly have been led to make them in the course of discussion on those subjects, which is quite a different thing from determining whether

they are fair and well founded, an extremely anomalous issue, and very difficult to distinguish from one of actual truth. But the question in discussion is not actual but apparent truth; and that, not in the opinion of a lawyer, or even a body of laymen, considering the matter some time afterwards, but in the mind of the writer, as he might view it when honestly exercising the right of free discussion. It is for the jury to say whether, in point of fact, he was so honestly exercising his right. It is for the judge to say, whether the particular matters are so far connected with, and so far arise out of, the subjects of discussion, that a public writer might honestly, in discussing these subjects, make such imputations. All that was put forth was fit subject for public discussion: simply because the Doctor made it. It was he who made public profession of his anxiety for the safety of the heathen, and made that the very basis of his scheme. It was to enable his zeal to shape itself in earnest appeals to his fellow Christians that he asked the subscriptions of the "friends of the heathen." He, as thirsting for the souls of the heathen, asked those friends to assist him with their money in order to urge others to save those souls. Obviously everything turned on that anxiety for the heathen's souls. All must depend on its depth, intensity, and strength. It was the consideration, so to speak, which the friends of the heathen were to have for their money; they were to have the benefit of his appeals to others. The efficacy and energy of those appeals must depend evidently on the strength of his zeal, and that upon its purity. To the exact extent to which it was alloyed, if at all, by any other motive or aim, to that extent it must be weakened, and the energy and tone of his appeals diminished. That, then, was the most important point of all; it was that which alone, in any point of view, made the matter worth public discussion. But that the Lord Chief Justice excluded from discussion; and he laid it down as law, that it could not be suggested that the motive of a man in putting forth public proposals to subscribe to his own paper, and thus improve his own property, was

partly to produce that effect, although it will be seen the Lord Chief Justice himself avowed his belief that it was so, and said that a public writer might naturally suppose that it was so.

“And it is said that the circumstances were such as not only to entitle the writers of the *Review* to criticise in a hostile spirit the scheme of the plaintiff, but also to impute to him sordid and base motives in putting it forward, for that it is obvious that it could do good to nobody but the proprietors of the paper. I own, however, that my view of the law does not accord with this. A public writer is fully entitled to comment upon the conduct of a public man, and this was a public matter and a fair subject of comment. But it cannot be said that, because a man is a public man, a public writer is entitled not only to pass a judgment upon his conduct, but to ascribe to him corrupt and dishonest motives. That, in my view, is not the law, and the privilege of comment does not go to that extent.”

Nor was it contended that it did. Nor is it contended. Nor has it ever been contended, that merely, “because a man is a public man” a public writer is entitled to ascribe to him corrupt and dishonest motives. Nor was it attempted here to impute to Dr. Campbell “corrupt and dishonest motives:” for it is neither “corrupt nor dishonest” for a man to seek to circulate his paper by putting what he sincerely believes to be very excellent matter into it. “Corrupt and dishonest” were epithets introduced by the Lord Chief Justice, not by the Reviewer. What was and is contended is this, that when a man makes a public profession of his motives, and a public exposition of a scheme based upon those professed motives; and a scheme which, obviously, as a simple matter of fact, will tend to promote his own worldly advantage; and propounds, as means for the furtherance of his professed object, pecuniary subscriptions or donations to himself; that then the whole of what he thus puts forth is fit subject for public discussion,—means, motives, and all,—the whole being so closely connected, and so put forth together as elements

of the scheme, that the real, true nature, and character of the scheme depends as much on motives as on means; and the value of the means depends almost entirely on the motives. This was what was contended; and this is what we contend and what we conceive to be clearly and beyond all doubt the law. And if we wanted confirmation of our conviction, we should find it in the singular inappositeness of the illustrations or analogies adduced by the Lord Chief Justice, himself so clear-headed and logical, in support of his view. They are obviously so utterly inapplicable, so entirely the opposite of the case in hand, that they suggest the unavoidable inference that the lucid intellect of the Lord Chief Justice has been distracted and drawn away from the real question at issue, otherwise he never could have dealt with it so inappropriately.

“Take the case of a statesman. His public conduct is open to criticism in speeches or in writings. But has anyone a right to say that he has sold himself, or that he has been inspired by base and sordid motives, unless prepared to justify those allegations as true?” [That is, if there is nothing to lead thereto.]

“Take the case of a general in command of a fortress, who has surrendered it earlier than the necessity of the case, in the opinion of others, required. His conduct in so doing would be open to the most severe criticism, but would there be a right to say that he had betrayed the fortress into the hands of the enemy for a corrupt consideration? Surely not.”

“Take the case of a treaty concluded by a statesman with a foreign power; suppose its terms to be disastrous to the country. Its terms would be open to the most severe criticism and the most righteous condemnation; but would there be a right to say that the statesman had sold his country? I think not.”

And so, with all respect, think we. There is no possible doubt, in these cases, that the libels would be most malignant and inexcusable. Why? Because there would be, in the cases supposed,—the voluntary, arbitrary, gratuitous, utterly unwarrantable imputation of corrupt motives, for acts, done



in the discharge of public duty, which the law presumes to have been done honestly, and without the least colour of occasion, so far as appears; even for the discussion of the motive at all, much less for the imputation of bad motive.

But, to make these cases at all analogous to the present, we must abstract from them that element which entirely distinguishes them—the element of public duty—and we must also add the element which gives to the present class of cases all their distinctive character, viz., the public exposition of the man's motives, and the propounding of them as the basis of proposals, partly, (as a mere matter of fact, beyond all doubt,) for his own benefit. Suppose the minister chose to publish his correspondence, or his speeches, and that a public writer, commenting thereon, and upon expositions of the statesman's motives, and comparing them with other matters of admitted facts and dates, &c., deduced inferences conveying imputations of motives partly selfish, that would be more like the present case; and who can doubt it would be a case of privileged comment? But even that would not be this case, unless the minister's acts were not done in the discharge of public duty, but merely in the ordinary pursuit of his political vocation or career—as, making a popular speech just before an election, or proposing a particular measure at a particular conjuncture, or the like. And who will venture to say that the liberty of fair comment on public matters like this would not extend to sarcastic strictures on the minister's speeches, suggesting, with reference to time and other circumstances, that the motives for such and such measures or movements were not unalloyed patriotism, but mingled with some desire to retain office, or to regain place? Nobody knows better than the Lord Chief Justice, who himself has filled a distinguished position in Parliament, that such imputations are within the acknowledged liberty of free discussion, both in Parliament and the press. And when he puts the case of a particular imputation, that a minister has sold himself for so much hard cash, he puts a case which happily is not

likely ever to occur, even in any one's imagination, except as an illustration in reasoning. But if there were any public action by a public man which should give any kind of colour to the charge—as in the well-known case of O'Connell's celebrated letter to Raphael about the seat for Carlow—"say £2000,"—beyond all doubt, such an imputation, even of pecuniary corruption, might legally be made; and, in the instance we have mentioned, was made, by the whole press of England, and made with perfect impunity, and without a doubt of its legality. The question whether an imputation is excused by the privilege of free public discussion, depends on just the same principle as would decide whether it would be protected by the privilege of private communication, viz., whether it was within, or went beyond, the occasion—that is, whether it arose naturally out of the subject-matter of discussion, or whether it went so far out of it, and away from it, as to be malicious. It would not depend merely on its own absolute character, or the degree of the imputation conveyed; but on its nature and character, relatively to the occasion and subject-matter of discussion, and as compared with the materials out of which it was professedly deduced. It is obvious, therefore, that it is impossible to predicate *à priori* what imputations may or may not be privileged. Any imputation may be, or may not be, under the circumstances.

The question would be in these cases, as in the present, whether there were any public incidents of or circumstances around the act, which would so far qualify it as to make the motive fair subject of public discussion. That would depend entirely on the circumstances of each case; and, probably, the Lord Chief Justice did not mean to lay it down broadly, that in no case could the motives of a public man be fit subject of discussion; but only that they could not be impeached where they were not so. Now, that is clear law as to every subject of imputation, whether acts or motives. In the present case, there was a question how far the plaintiff, in his character of editor, and also projector of this scheme, was a public man, so as to

make his public acts, as such, fair subjects of public discussion ; and how far the public incidents of his acts, or the character of his proposals, as declared by himself, were fair subject of discussion, in so large a sense as to include the suggestion of an obvious motive, which would depend on these proposals themselves, and the letters, &c.

If we are right in our view of the scope of the Doctor's publications, then no doubt the Lord Chief Justice was wrong in telling the jury, that the probable authorship of the letters, and the probable object of the Doctor in issuing his proposals, were not fair subjects of comment. And in that view, probably he himself would not have disputed that they were fair ; or, at all events, not so unfair as to be malicious, and deprived of the protection afforded by the privilege of free discussion. At all events, he did not appear to think that there was any evidence of such excess as to be express malice, assuming the imputations relevant, and arising out of the subject of comment. Nor did he say or imply, that if they were relevant, and did arise out of the subject of comment, they would not be protected, in the absence of such excess, and of any other evidence of malice.

The Lord Chief Justice laid it down, it will be seen, that there was no lawful occasion to discuss the Doctor's motives, or the genuineness of the letters ; for that neither the one nor the other arose out of the Doctor's publications, and so neither of them were fair subject of comment. And, if the Lord Chief Justice were right in his views of the Doctor's publications, he was certainly correct. But then he could not be right in that view, as it seems to us, because the Doctor's motive and extreme anxiety about the heathen were made the basis of the scheme ; and because there were very many circumstances on the face of his publications which did, in our opinion, raise the question of the probability of the letters not being genuine. It is, however, entirely a question of construction of those publications. Nor are we sure that the Lord Chief Justice laid down or implied any proposition of

law not perfectly correct ; nor that he applied the law wrongly, except upon the assumption that he was wrong in his view of the scope of the plaintiff's publications, or confounded fair subject of comment with fair comment.

The Lord Chief Justice did not lay it down that, if these matters were fit and fair subjects of discussion, there was no privilege in the discussion of them ; and that the defendant would be liable, even although he wrote honestly, and under an honest belief. But he laid it down that there was no fair occasion for discussing these matters at all, out of which the imputations arose ; and that the imputations did not arise out of the matters which there was a fair occasion to discuss. And he did not lay it down that honest belief was always immaterial ; but that it was not material when there was no lawful occasion to discuss the matters out of which the imputation arose ; or when the imputations did not arise out of the particular matters which there was occasion to discuss. And again, on the same ground, the Lord Chief Justice did not leave the fairness of the comments to the jury.

So, when the case came into *banco*, unfortunately the Court appeared to understand that they were asked to affirm that the mere fact that there was a fit occasion for public discussion of a subject to which the imputations might not be utterly irrelevant—coupled with honest belief in the truth of the imputation—conferred a privilege or protection. And, of course, on that view of the defence they negatived it, not only decidedly, but with some degree of natural impatience ; and then, as often happens, uttered some expressions which looked like a broad denial of any privilege in public writers on public questions. These *data* are obviously either to be deemed *obiter*, or they are to be referred to and restrained by the question to be determined—which was, the existence of privilege or protection in a case of imputation upon subjects deemed not to have been fair subjects of discussion or imputation at all. Unless so construed and restrained, these *data* are clearly contrary to the authorities.

For the reasons we have given, we conceive that they did; that the case was one of privilege, on the ground that there was a right of free discussion, as to those particular matters. And we conceive, further, that the real question was honest belief—because everything else on which the question of the honest exercise of the right might depend was admitted, or not disputed. Personal motive was not imputed; nor was there any such violence of language as would, on the face of the article, show general malice. And the Lord Chief Justice himself told the jury, not only that the occasion was one for severe observation, but that the particular observations made were such as might very naturally have been made; and were no doubt made with no other motive or intention than to denounce the scheme which he himself described as fit subject for severe observation.

Assuming that the plaintiff's publications made the subject of the imputations complained of part of the subject of discussion, then the Lord Chief Justice expressly said that the writer had honestly exercised the right of free discussion:—

“It is impossible to conceive any subject on which comment and criticism might more fairly be made, and any writer who thought that this proposal of the plaintiff could only end in disappointment to the public who might be induced to subscribe to his paper, and that they would be throwing away their money, would have a perfect right to comment upon it, with some latitude of criticism and comment. And it is to be regretted that the means proposed by the plaintiff to carry out his ends should have been of a somewhat doubtful character. It certainly does at first sight seem to be so when a man says, ‘Here is a great work—a work in which all Christians should unite.’ And how is it to be accomplished? ‘Subscribe to my newspaper.’ It does sound odd, and provokes the suggestion that it is not so much the interests of religion which the man has in his mind as the promotion of the circulation of his own paper. And when a person not imbued with his religious views comments upon the case it might easily suggest itself to his mind in that point of view. You may

think that there was no ground for it, but still, if it might naturally suggest itself to the mind, you must make some allowance for the position of the writer, who may have been influenced by a sense of public duty; for I cannot help saying that I think it is going too far to state that the object of the article was to injure and crush the plaintiff. There was a strong spirit of antagonism naturally aroused by these very conflicting views on a matter connected with religious opinions, and the writer in the *Review*, no doubt, sat down to attack the plaintiff, not as the individual, but as the journalist, and as an upholder of particular views. And if he has, in doing what he might conceive to be his duty, unjustly aspersed the plaintiff, we must still look at the matter as one arising out of a public controversy, and not as one in which there was any intention to wound and injure the plaintiff."

It would be impossible more fully or more explicitly to admit that, assuming the subjects of imputation to be fair subjects of discussion at all, the right of discussion was honestly exercised for the purpose of honest discussion. Then, what was wanted, in that assumption, to constitute a legal excuse? Nothing but honest belief, if that was not indeed implied; that is to say, waiving the question as to what was fit subject for public discussion, (it being laid down, however, that there was some ground for hostile observation and severe censure,) there was no intention to injure the plaintiff, nor any other intention than to exercise that right of public discussion and hostile observation upon obnoxious publications and proposals of the plaintiff; that is to say, there was an honest exercise of the right, which, according to the authorities, was a right the honest exercise of which carried with it a privilege and a protection in the absence of any evidence of malice. But according to the above observations of the Lord Chief Justice, there was no evidence of malice, and there was an honest exercise of the right. What more could be required to confer protection? Nothing more,

beyond all doubt, than the honest belief in the truth of what was written.

That question was left to the jury separately, with a direction that it was not material; and they found it in favour of the defendant. Of course, if the occasion was one of privilege, that would amount to a verdict for the defendant. Nor would it be necessary even to leave it to the jury in his favour, or as part of his case. The occasion being privileged, the absence of malice is presumed in the absence of evidence to the contrary. That evidence it was for the plaintiff to find or suggest, and to ask to have left to the jury. The presumption of malice was already negatived. It was for the plaintiff to restore it. The finding of *mala fides* would have replaced it; but the finding of honest belief was not necessary to remove it. It was already displaced. There was no evidence of wilful falsehood. The question of honest belief was not necessary for the defence, as it had been admitted that the defendant wrote honestly. The jury were told so. It was superfluous then of the counsel for the defence to ask to have honest belief left to the jury at all; nor would he have asked it had he known that the judge would tell the jury that the writer wrote honestly and for an honest purpose. The Lord Chief Justice evidently quite misunderstood the view with which the question was suggested. He thought, and so did the Court *in banco*, that the defence was put entirely upon honest belief; that is, that there was a privilege or protection merely by reason of honest belief. Not at all. The question was proposed thus:—that as the occasion was privileged, the publication would be so at all events, if there was an honest belief, because there was an honest exercise of the right. The latter being admitted, the former was virtually involved in it. And the admission that the writer had written honestly carried with it entire immunity, unless there is no protection to a public writer on a fit subject of public discussion.

The Court did not say that there is not such a privilege in

the discussion of public matters out of which the particular imputations might naturally arise, but only that there is not such a privilege in the discussion of matters out of which the particular imputations do not naturally arise, or in the discussion of matters not public, and which there is no right to discuss. If any observations were made which might appear to imply that there must be materials whence the writer might fairly infer the imputation, such observations must either be deemed *obiter*, and going beyond the occasion, or must be limited and explained with reference to the point on which the defence was supposed to have been rested, that honest belief is, *per se*, sufficient; which, of course, led the Court to comment on the insufficiency of honest belief, without, at least, reasonable grounds for the imputation. But they were speaking of a case in which—apart from that—they deemed there was no privilege, because there was no lawful occasion to discuss the matter out of which the particular imputations arose. They cannot be taken to have laid it down, that, assuming such a lawful occasion to discuss matters out of which the particular imputations might naturally arise, it would be necessary that they or the jury should consider that there was fair ground for the imputations. As to the jury, there cannot positively be any questions for them but whether libel or no libel, or malice or no malice. As to the Court or the judge, the only questions that can arise are, whether there is a lawful occasion to discuss the particular matter out of which the imputations may naturally arise; not whether the imputations are fair. That is no question, then, either for judge or jury; the only question that can arise, even for the jury, is, whether they are so unfair as to be malicious.

We regret that some of these remarks should have been made, because they may have produced an impression that the great right of free discussion, one of the most valuable possessed by Englishmen, has not the protection or privilege which is given by the law in all cases of even private right;



viz., the privilege of immunity from legal liability for casual defamatory observations in the course of its honest exercise. We hope, however, that we have shown that these remarks are either to be deemed *obiter*, or are to be considered as applied only to cases in which the imputations are beyond the limits of discussion, because the particular matters are not within the scope of the subject-matter of discussion, and so not within the lawful occasion of discussion. The case the Court were called upon to consider was one in which the judge at the trial had been left under the impression that any imputations were protected, if relevant to the general subject of discussion, provided they were honestly believed to be true, and even *in banco* the Court were left under the same impression, and it was to that they pointed their observations.

It was said, more than once, that public writers are mere "volunteers;" but, in the words of a great judge, "there are many cases in which volunteers have been held to be privileged when acting *bonâ fide*."\* And it must be taken that the Court here meant that public writers are volunteers, only when they make imputations on subjects which are not fair subjects of comment. The very notion that an occasion has arisen for public discussion of a matter, is surely a notion that the matter is of public interest, and that the discussion of it will be for the public benefit. It is an abuse of terms to sneer at a public writer under such circumstances as a "volunteer." In no sense in which the term is ever used in law is he justly so to be called. He is not a mere wanton, idle intruder into the subject.

The law tells him that it will be for the public interest that he should write upon it, and he writes in the exercise of what the law deems a valuable public right. So highly does the law value it that, on any view, it allows some degree of protection or immunity to its exercise; and it is, we repeat, an abuse of language to call those who exercise a legal right

\* Maule, J., 10 C. B. 583.

which they are by the law encouraged to exercise, "volunteers." And most illogical is it upon this abuse of language to found an argument; and from a false statement of the case to deduce an inference fatal to the immunity. The law declares there is a fitting occasion for public discussion, because it deems that discussion is for the public benefit. How monstrous for judges to declare that the man who exercises this right is "a volunteer," and thence to infer that he has no privilege!

Even if the assumption were as fair as it is the reverse, the inference would be ill-founded in law, for, as we have shown, volunteers often have privileges. But to make a gratuitous assumption, and then to found on it an utterly fallacious inference in order to show that a man has no privilege in the exercise of a public right which the law encourages him to exercise, is surely a most unsatisfactory mode of argument.

Surely the fair and proper inference from the acknowledged existence of what the law deems a valuable public right is, that its honest exercise is protected. The inference is so natural and simple that it commends itself to common sense and scarcely requires authority. But all legal analogy is in its favour. There is no instance of a public legal right recognised by law on the ground of public interest, the honest exercise of which is not protected. The instances of a criminal prosecution, or a civil suit, are familiar illustrations. All privilege is based on public interest. Some are personal and partake of the nature of *privilegium*, such are the privileges attaching to the office of the judge, or of the advocate, or the character of the witness. The advocate has freedom of speech because his office is deemed for the advantage of the administration of justice, and, therefore, for the public benefit. The public writer is told that he may discuss a subject because its discussion is for the public interest. To tell him that he may do so if he writes nothing that can be deemed, legally defamatory, is to tell him nothing, or to tell him nonsense. A man

knows that he may write anything of anybody if it is not defamatory. To tell him again that he may write anything a jury may happen to deem "fair," is to delude him with the pretence of a protection which will fail him in his hour of greatest need, and in his hour of greatest merit. Never does a public writer less require protection and less deserve it, than when he panders to popular feelings, and so is certain of the sympathy of a jury. Never does he more require it, and more deserve it, than when he is running counter to popular feeling, and is certain not to have the sympathy of the jury. And in such a case to tell him to go to a hostile jury to say that his observations are fair, is merely to insult him with a mockery of justice. There is nothing which is more difficult, even to the most enlightened and impartial mind, than to say what is "fair" in observations which are obnoxious, and opinions which are disliked, and expressions which displease, the persons who are to judge. And to invite a public writer who has exposed some popular impostor, or some public pretender, to go before a jury and ask them to say that his reasons and his strictures are "fair," is really an idle mockery; but the law imposes no such idle task upon him; it puts him in no such peril. It tells the jury on their oath to acquit him unless they are satisfied that he wrote maliciously. And if there is no evidence of malice the Court will not allow a verdict against him. Malice or no malice is a distinct intelligible issue, beyond the vague region of mere arbitrary opinion, which can never be reviewed; and within the definite province of legal evidence and judicial judgment.

There, then, is a real protection, an effective privilege; anything short of that is a mere pretence, a "mockery, a delusion, and a snare." It is to lay snares for public writers to invite them to write, and write severely, and in terms of indignant censure, and at the same time lie in wait to fall upon them if they transgress the letter of the law of libel. It is to put traps, and dig pitfalls, and then bid them walk boldly and

fearlessly along the way : or, if the pitfalls are open to view, then it is to destroy all fearless writing, and make them creep and crawl about feeling their way most pitifully, afraid to denounce a delusion or expose a sham.

Since writing the foregoing remarks, the case of the Earl of Cardigan, which came before the same Court, has afforded an illustration, and, in some degree, confirmation of what we have submitted. In that case there was ground for a statement that the Earl had, as a matter of fact, ridden back alone from the battery, before the rest of his brigade had charged, but there was none for an imputation of cowardice, which the Court deemed to be conveyed. There was nothing, in their opinion, to give a colour or pretence for that imputation, and so there was no protection on the score of free discussion. But the different members of the Court said not a word against the existence of such a protection within the legal limits of the right; even in the case of erroneous and injurious imputation, if honestly made in the exercise of the right. On the contrary, they again and again, in the course of the argument, drew attention to the distinction between an erroneous inference, and an imputation wholly unfounded. And in the course of his eloquent judgment, the Lord Chief Justice thus clearly and explicitly laid down the law upon the subject, evidently after some reconsideration, and with a view to avoid any inferences hostile to the due protection of public writers, or unfavourable to the free exercise of the right of public discussion :

“ But then it is said that, whether the imputation was true or not, this was a case in which the defendant, as a public writer, and an historian of the events of the campaign, had a right to make such comments as he pleased upon the conduct of the Earl of Cardigan, who had borne so conspicuous a part in the events of that campaign. But this doctrine must be taken with certain limitations. It is true, indeed, that the events in question were of the deepest possible importance. It is true that the conduct of all who were engaged in them is fair and legitimate subject of public observation ;

and, whether the observations are contained in the periodical publications of the day or in a work intended to be a record of the events to which it relates, the rule is the same—that the public conduct of public men is always properly the subject-matter of fair public discussion ; but with this qualification, that the discussion must be kept within fair and legitimate limits ; and, according to the rule this Court laid down recently (in the case of *Campbell v. Spottiswoode*), it is not enough that a man who may be actuated by any of those motives which so often actuate us and produce an unconscious bias in the mind (even without our being aware of its influence)—personal dislike, political animosity, professional rivalry—all those causes which unhappily, in the infirmity of human nature, tend to create prejudice and ill impressions, too often without real foundation—it is not enough that a man influenced by motives of this nature but of which he may perhaps himself be unconscious, takes an unfair, uncharitable, and unjustifiable view of the conduct of the public man whom he sits down to criticise—it is not enough that he has persuaded himself of the truth of the view which he thus takes ; he must take care that, if he sits in judgment upon the conduct, or the character, or the honour of others, he does so in a fair spirit, and a reasonable manner, and he must be prepared to satisfy a jury, not, indeed, always that he has written what is actually true, but that he had at least fair and reasonable grounds for the censures he has cast upon the conduct of others. Here, therefore, it is not merely because Colonel Calthorpe had taken upon himself as a public writer to describe the events of the Crimean campaign that, therefore, he is entitled to deal recklessly with the character of others who may have been mixed up in the events he narrates ; and the question whether these were fair comments or not is not for this Court to determine, but for a jury. The question for a jury would be—not merely whether the writer was sincere in his belief, but whether the circumstances were such as that the comments were fair and legitimate.”

Now here it is plainly implied that, within the legal limits of the right of free discussion—that is, on subjects which are the fair subjects of discussion, erroneous though injurious misstatement, if honestly in the exercise of that right, and fairly

arising out of the particular matters which are fair subjects of discussion, are protected from legal liabilities. And though there is a little confusion as to the relative province of the jury and of the judge, we think when the Lord Chief Justice spoke of leaving it to the jury whether the comments were fair, he merely meant upon the question whether the defendant wrote in the honest exercise of his rights (which would be essential to his protection), and that when he said "fair," he meant not that they were to say whether the comments were in their opinion fair, but whether they were in their opinion so unfair as to be reckless and malicious. This is implied in the expression "fair spirit," and as in another observation made by the Lord Chief Justice, that if the observations were such as were so unreasonable and outrageous that no one could honestly have made them upon the materials before the writer they could not be protected.

Some of those observations, in *Campbell v. Spottiswoode*, certainly seemed to imply that a public writer is to be held strictly in the exercise of his right of fair discussion to that which a jury may consider to be fair. We have given our reasons why we consider this a position not warranted by law, and one which would be fatal to freedom of discussion in the class of cases where it is of most importance, and in which public writers most require, and most deserve protection—that is, cases in which they are in opposition to popular prejudices and predilections. We may urge, further, that such a theory leaves it wholly uncertain in what sense the word "fair" is used, whether with reference to actual truth, as proved at the trial (with or without a justification), or to the truth as it might fairly appear to the writer on the materials before him, or merely with reference to the opinion of the jury. In the first view, "fair" would be the same as true, and deprive a public writer of all protection short of a justification. In the second view, it comes very near in substance to what we have been urging, only putting it more confusedly, and huddling up the province of the jury and of the judge, and confounding the

question of what is fair subject of comment, with the question what is fair comment.

But it falls short of the law, as we conceive, in this, that it refers to the jury something else than that which we contend is in such cases the sole question for them, viz., did the defendant honestly exercise his right, without malice? As to the third way of putting it, viz., referring it absolutely to the jury, we have altogether failed in our argument if we have not satisfied our readers that it is utterly contrary to law, and puts public opinion absolutely at the mercy of the jury. We think we have done some service to the profession in drawing attention to this matter, if the view we have taken is, as we hope we may consider it to be, the correct one, in order to prevent misapprehensions which might have prevailed as to the real effect of the decision. If we are wrong, however, in this, and the Court meant to determine that in no case is there privilege to a public writer, but that he is to be held strictly to what a jury may deem "fair," then, indeed, this decision is the heaviest blow ever yet given to freedom of discussion, and a retrogression of more than half a century in the liberty of the press. It can scarcely be so, however, as we would fain hope, because the question of fairness of comment was not left to the jury at all (as it ought to have been, had such been, the law), and the Court did not say that it ought to have been, but said that the matters of the imputation were not fair subjects of comment. If there was an error in that, it was an error not in the law, but in its application to the particular case, and we trust, therefore, that nothing can be deemed to have been decided in that case at variance with what we have ventured to lay down as the general law upon the subject.

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**PART VII.—***The Parliamentary Regulation of Labour in the Fourteenth and Fifteenth Centuries.*

**THE** rural inhabitants of England—if really straitened in the time of Edward the Third, were destined to be relieved by the coming of an awful visitant—

**"Ther came a privee thief, men clepen Deth,  
That in this contree all the peple sleth . . .  
He hath a thousand slain this pestilence . . .  
                                he hath slain this yere  
Hence over a mile, within a gret village,  
Both man and woman, child, and hyne, and page."**

The plague of the years 1348 and 1349, called the Great Death, is said to have destroyed nearly two-thirds of the population. A mightier power than King Edward encountered him in the midst of his career, and forced him to utter the penitential words impressed upon some of his gold coins—

**Domine ! Ne in furore tuo arguas me !**

At this time numbers of men were drawn off by the wars, while the growing manufactures attracted increasing numbers, and the pestilence was naturally followed by a lack and dearth of agricultural labour. The lack could hardly be supplied by human means, but the dearth was supposed to be within the compass of an Act of Parliament, and therefore after the following preamble:—

“ Because a great part of the people, and especially of workmen and servants, late died of the pestilence, many, seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness than by labour to get their living, . . . considering the grievous incommodities which of the lack, especially of ploughmen and such labourers, may hereafter come, . . . ”



It was ordained—

“ That every man or woman in the realm of England, of whatsoever condition, whether freeborn or servile, if able-bodied and under the age of sixty years, not living by merchandise, nor having any certain craft, nor means of his own to live upon, nor land of his own, in the cultivation of which he may be employed, and not retained in any one’s service, if required to labour in any service suitable to his condition, shall be bound to serve the person who chooses to engage him, for the wages, liveries, rewards, or salaries, accustomed to be offered in the districts in which he ought to serve, in the twentieth year of the King’s reign—the year 1346—or in the five or six ordinary years immediately preceding.”\*

The breach of this ordinance was visited by heavy penalties, both upon the employers and the employed. No man might give alms to any person able to serve, under pain of imprisonment.

At the end of two years there were complaints that the new statute of labourers had not been observed :—

“ Forasmuch as it is given the King to understand . . . that the said servants, having no regard to the said ordinance, but to their ease and singular covetise, do withdraw themselves to serve great men and other, unless they have livery and wages to the double or treble of that they were wont to take the said twentieth year.” . . . .

And it seemed good that the wages of labourers and artificers should be definitely fixed.

Another Act of this year, 1351, shook one of the bulwarks of freedom: it allowed a lord to seize his villein and allege villenage, in an action brought against him by the villien, although there might be a writ *de Libertate Probanda* depending. The law could no longer justly boast of its patronage of liberty.†

The statutes concerning labourers were re-enacted or confirmed in the thirty-fourth and forty-second years of Edward the Third, and again in the second year of Richard the

\* 23 Ed. 3.

† F. N. B. 177. Co. Litt. 124 b.

Second. By the Act of 1360, a fugitive labourer might be outlawed, and after capture, might be imprisoned, and branded with the letter F if the person aggrieved demanded it; but this punishment of burning was deferred until the succeeding Michaelmas, and then could only be done by the advice of the magistrates, and the consent of the sheriff who kept the branding iron. The landlords were not merely unwilling to pay good wages, they tried to get agricultural service without payment; their tenants were still nominally subject to tributary labour, but in the counties around London, this labour had become almost obsolete; it was considered irksome and degrading. The attempt to enforce it seems to have been the main cause of the great rising in 1382. The Kentish men had been stirred by the preaching of John Ball; there was a general prejudice against the thrifty Flemish weavers who had settled in England, and were supposed to be taking bread out of English mouths; and we should say that the poll-tax had more than an accidental connexion with the rebellion; the poll-tax must have been odious, not as a tax alone, and as a tax levied in an unpleasant, oppressive manner, but as a symbol of villenage. Were English freemen to be slaves, were they to be subject to head-money—the old charge upon bondmen, to tributary labour, to every badge and burden of servitude?

No sound can be more terrible than the voice of a mad-dened people. The disciples of John Ball came out with an uproar which had a powerful effect upon Chaucer, and Gower, and Walsingham, and all others who were conscious of it; they came out to conquer the realm with clubs, and rusty swords, and twibills; with bows ruddy by long hanging in smoky cottages, and a scanty provision of poorly trimmed arrows.\* King Richard bore himself well for once in his life, and Sir Robert Knollys—one of the ablest of the

\* Holinshead. Walsingham's Chronicle in Camden's Collection, 248, 251. Chaucer's Tale of the Nun's Priest. Froissart, lxxv.

leaders trained in the school of King Edward—was at hand;\* but an English government has seldom been in greater peril; and the end might have been otherwise if the peasants of Norfolk and Lincolnshire could have reached London before the men of Kent, and Essex, and Hertfordshire had been dispersed.

The peasant lived thenceforth under still stricter discipline. Although perhaps a freeman, he was almost attached to the soil. He could not step out of his hundred or wapentake without a licence under the King's seal;† complaint had been made that servants and labourers were wont to fly from county to county, because the ordinances were not uniformly executed; these migrations were usually made under the colour of a pilgrimage. A man brought up to the craft of husbandry until the age of twelve years was not allowed to adopt another trade. By statutes of Henry the Fourth, it was ordained that a man spending less than twenty shillings a year, should not make a handicraftsman of his son, and that no labourer should be retained by the week. Until 1416, the employer had been punished for a breach of the statute of labourers; in that year the penalty was confined to the labourer, but such penalties ultimately fall upon the employer, or upon the general public. The rate of wages was repeatedly settled in Parliament; we can notice only those Acts which were in force for any length of time. Wages were regulated in 1388—the twelfth year of Richard the Second, in 1444—the twenty-third year of Henry the Sixth; in 1515—the seventh year of Henry the Eighth. The statute of the last-named year enacts that no bailye of husbandry shall take for his wages by the year above 26*s.* 8*d.*, and for his clothing,

\* Hob the Robber, who is threatened by John Ball, may mean Sir R. Knollys; he for a time commanded one of the predatory bands called “companies of adventure,” in the fourteenth century, and “*Skinners*”—*Ecorcheurs*—in the fifteenth.

† Such a seal has the legend *Sigillum Regis in comitatu de N*—encircling the name of the hundred or wapentake. Seals of the hundreds of Walshcroft (Lincoln), Staploe (Cambridge), South Erpingham (Norfolk), and Wangford (Suffolk), may be seen in the British Museum.

5s., with meat and drink; no chief hind, as a carter, or chief shepherd, above 20s. by the year, and for his clothing, 5s., with meat and drink; no common servant of husbandry above 16s. 8d. by the year, and for his clothing, 4s., with meat and drink; no woman servant, above 10s., and for clothing, 4s., with meat and drink; no child within the age of fourteen years, above 6s. 8d. by the year, and for clothing, 4s., with meat and drink. The wages of each class, excepting the woman's wages, were slightly raised above the rates of 1444. Under the Act of 1388, the yearly wages of a bailiff were 13s. 4d.; of a chief hind or shepherd, 10s.; of an ordinary labourer, 7s.; of a woman, 6s. The Statute of 1515 proceeds to determine the wages of other workmen and artificers, and then ordains—that in the time of harvest every mower shall take by the day 4d., with meat and drink, and without meat and drink, 6d.; a reaper and a carter, every of them, 3d. by the day, with meat and drink, and without meat and drink, 5d.; a woman labourer and other labourers, every of them, 2½d. by the day, with meat and drink, without it, 4½d.\* Any servant in husbandry refusing to work according to this ordinance to be committed. Any labourer taking higher wages than the legal rate to forfeit for every default, 20s.; and every artificer and labourer to be at work between the midst of the month of March and the midst of the month of September before five of the clock in the morning; to have but half an hour for his breakfast and an hour and a half at his dinner, at such time as he hath season to him appointed for to sleep. And at such time as he hath no season to him appointed for to sleep, then he shall have but an hour at his dinner, and half an hour for his noon-meat, and he shall not depart from his work during that season till between seven and eight of the clock in the evening.†

\* Compare the rates of 1351 . . . no labourer for making of hay shall take but a penny on the day, and the mower 5<sup>d</sup> for the acre, or 5<sup>d</sup> for the journey, without meat or drink: no labourer reaper in the first week of August shall take but 2<sup>d</sup> a day—the second day 3<sup>d</sup>. . . . No man shall take for threshing of a quarter of wheat or rye, but 2<sup>d</sup> ob., and for a quarter of barley or oats 1<sup>d</sup> ob.

† We may doubt whether these rules were ever strictly observed. The

. . . . And from the midst of September to the midst of March every artificer and labourer must be at work in the spring of the day, and shall not depart afore night. And the said artificers might not sleep by day but only from the midst of the month of May unto the midst of the month of August. The same hours of labour are ordered by a statute of Queen Elizabeth passed in 1562; but the Legislature, convinced at length that no uniform standard could be maintained, directed that the wages of servants, labourers, and artificers should be assessed by the sheriffs and other magistrates.\*

While our Parliaments were thus dealing with labour, they passed a concurrent series of Acts concerning badges, liveries, and apparel.† These Acts were in some measure provoked by attempts to evade the former class of enactments. Landlords could not always hire servants in husbandry at the rates fixed by Parliament, and they could not give better wages with impunity. Hence the expedient was adopted of giving livery coats to ploughmen and carters to enhance their wages. This crafty device was encountered by Acts of Edward IV., ordaining that labourers should not wear hose costing more than thirteen pence a pair; that labourers and the wives of labourers should wear no cloth worth more than two shillings a yard; should have no silver lace upon their belts or girdles.‡ People have been innocent enough to believe that

people of Derbyshire did not adhere to them in the middle of the seventeenth century.

“For diet, the gentrie, after the southern mode, have two state meales a day, with a bit in the buttry to a morning draught; but your peasants exceed the Greeks, who had four meales a day, for the moorlanders add three more; y<sup>e</sup> bit in the morning, y<sup>e</sup> anders meate, and the yenders meate, and so make up seaven; and for certaine, y<sup>e</sup> great housekeeper doth allow his people, especially in summer tyme, so many commessations.”—*Philip Kinder*—(Lyson's Derbyshire, Introduction.)

\* 5 Eliz. c. 4. The rates of Servants' Wages within the City of Chester, limited at the general Sessions, anno 12 Eliz. (1570,) (Harl. 2054,) anno 38 Eliz. (1596). (Hal. 2091, f. 212 b.)

† 37 Ed. III. c. 8, 14. 16 Ric. II. c. 4. 1 Hen. IV. c. 7. 2 Hen. IV. c. 21.

‡ Juratores dicunt quia S.M. nunc serviens W.L. cepit apud K ad serviciu' ejusdem W.L. in servitio Husbandrie apud K. a festo Sancti Michaelis archangeli anno iiii domini regis nunc, per unum annum tunc proximo sequentem, pro xxx<sup>s</sup> in pecunia numerata, unam rogam, unum

when ploughmen figured in silver lace they really paid for all their bravery; that ploughmen lived under Edward IV. in ease and comfort and absolute luxury.

These Acts of Edward\* had, of course, a further object. They were designed to check extravagance, for people in those days were really very fond of gay clothing. Monstrelet's Friar Thomas Conecte is a witness that the taste was not confined to England.† In England it extended to persons in low ranks of life, even to priests and friars. The laws were likewise aimed at the custom of maintenance; by giving badges and liveries, noblemen attached to themselves a crowd of followers and partisans, to the great detriment of peace and justice.‡ It became the main business of a justice of the peace to enforce the laws relating to labourers, vagabonds, retinues, badges, liveries, and apparel.§

The landlords still tried to get ploughing and reaping done for them by the tenants, and the tenants being more willing to pay than to work, the landlords improved their rents by increasing the fines which were due for services unperformed; thus raising the conversion price of labour,|| while they tried to

*capicium, unum par callegarum, unum par sotularium ad valentiam vii, necnon cultur' octo acr' terre, precii x<sup>s</sup>, contra formam statuti in hujusmodi casu edit' et provisi etc.*—(Tottyl's Tracts, 66.)

*Quia cum in statuto domini regis H. 4 nuper regis Anglie anno regni sui vii etc ac in statuto in parlamento domini Henrici sexti bone memorie anno regni sui octavo . . . inter cetera contineant, quod non liceat alicui cuiuscunque status gradus seu condicionis fuerit, dare aliquam liberatam vesturam, vel capis' alicui persone nisi tantum modo familiaribus, officiariis, ballivis et servientibus suis, et aliis hominibus de consilio suo in una lege seu altera eruditis . . . quidam tamen R. B. de C. in com, Huntingdon armiger statuta predicta minime ponderans, quandam liberatam vestur' videlicet diversas togas coloris *frost medow* quibusdam J. de B. yoman etc et R. C. de eodem yoman, qui non sunt neque unquam fuerunt servientes . . . ipsius R. B. . . . dedit et distribuit.* (74 b.)

\* 3 Ed. IV. c. 5. 22 Ed. IV. c. 1.

† 2 Johnes' Monstrelet, 490.

‡ "It is the guise of your countrymen to spend all the goods they have on men and livery gowns." A saying of Chief Justice Billing, recorded in the Paston Letters.

§ Tottyl's Tracts, 30 b.

|| . . . in ancient times, almost all rents were paid in kind, in a certain quantity of corn, cattle, poultry, &c. It sometimes happened, however, that the landlord would stipulate that he should be at liberty to demand of the tenant, either the annual payment in kind or a certain sum of money instead of it. The price at which the payment in kind was in this manner ex-

beat down its market price. The tenants might well ponder over this, and might well ask their rulers to explain the sense and the justice of it. In the year 1438 the tenants of Rickinghall, which lies between Norwich and Bury, presented a petition to their landlord, the Abbot of Bury, showing that in former times they had been accustomed to render divers quarters of oats, and to do diverse operations in winter, summer, and autumn, as well as acts of portorage on foot or on horseback; all which things, as appeared by a certain old register of the Lord Abbot, had been converted into money; that is to say, it had been arranged that the tenants should give for every quarter of oats two shillings, and for three works in summer and winter one penny, and for every autumnal work without reserve one penny halfpenny, and for every summage or horse load, one penny, and for each act of common portorage, or footaver, one halfpenny. And whereas certain land-agents of Rickinghall, of their own authority had altered these accustomed rates, and had for some time past directed that two shillings and eight pence should be paid for every quarter of oats, one penny for every work in summer and winter, fourpence for every work in autumn, twopence for summage, and a penny for portorage, it was the object of the petition to induce the Lord Abbot to concede that thenceforth two shillings and twopence might be paid for the quarter of oats, a halfpenny for each work in summer and winter, three-pence for each autumnal work, a penny-halfpenny for summage, and a penny for portorage; and to release the tenants from the obligation of undertaking the offices of reeve and hayward, which they found very burdensome, and desired to be quit of altogether: in return for these concessions the tenants were willing to pay an additional rent of one farthing upon the acre. *Abbas suum temperavit responsum*—The Abbot made a considerate answer, declared himself personally well-

changed for a certain sum of money, is in Scotland called the conversion price. (Adam Smith.)

inclined to meet the wishes of the tenants; but it does not appear that their memorial received any further attention.†

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ART. III.—ON THE TRIAL OF ISSUES INVOLVING THE CONSIDERATION OF SCIENTIFIC EVIDENCE AND THE EVIDENCE OF EXPERTS.†

**A**LTHOUGH this subject so recently occupied our attention, I cannot help feeling that neither the Society nor any individual members of it can require from me an apology for the continued discussion of so important a question as that which relates to the true position of science and skill in the administration of justice. Much less can I allow myself to believe that the Society could deprecate the use of its time in endeavouring to discover how the different departments of human knowledge may be made subservient to the practical efficiency among the people of the principles of our system of jurisprudence.

And, in truth, this serious question, notwithstanding all the debate and controversy we have had about it, has not yet received its solution. Nor, when we attentively consider the objections that have been made to proposed changes in the existing procedure, can we wonder at the hesitation, so plainly manifested by our profession, to interfere with the present mode of trial which does not exempt skilled knowledge from the ordinary conditions of sworn testimony.

\* Add. 14850, f. 143 b.—

	Ancient Rates.	Modern Rates.	Proposed Rates.
Quarter of oats . . . .	ii <sup>s</sup> .	ii <sup>s</sup> . viii <sup>d</sup> .	ii <sup>s</sup> . ii <sup>d</sup> .
Each general work . . .	$\frac{1}{2}$ of a penny . . .	id. . .	ob.
Each autumnal work . .	id. ob. . . . .	iiii <sup>d</sup> . . .	iii <sup>d</sup> .
Summage . . . . .	id. . . . .	ii <sup>d</sup> . . .	id. ob.
Porterage . . . . .	ob. . . . .	id. . .	id.

† A Paper by Robert Stuart, Esq., read at a general meeting of the Society for the Amendment of the Law, held on Monday, the 22nd of June, 1863



It is, indeed, well that it should be so, and that a right and discriminating conclusion should not be arrived at, on so large and difficult a subject, without reiterated and anxious consideration, and without hastily setting aside a practice, like the present, which, whatever its intrinsic defects, has contrived not only to maintain itself without disrepute, but to have attracted to its support a great and learned experience. Its very detractors (if I may be allowed to use an expression that may appear harsh to the minds of some) have been its disciples; and our learned and able colleague, Mr. Webster, will, I feel assured, not refuse to admit the claims of a procedure in the service of which he has himself accumulated that learning and forensic ability which have made him one of our chief authorities in this delicate branch of legal administration.

But undoubtedly an amendment of the law is here required. What form that amendment may assume, and what may be the weak spot it may discover, I fear we are scarcely yet able to show. Is it that our present mode of trial overlays too much the witness's scientific mind, or the generic quality of the expert's skill, and that *nisi prius* does not treat these aids to its justice with becoming respect? Or is it that juries take too low a measure of the claims of science, regarding them simply as helps and contributors of those particulars which are inductively to lead to their verdict? Or is it that the breast of the judge requires to be scientifically instructed and expanded, and that the mind and conscience of the Court itself are judicially wanting in this one great element of its constitution? Or is it that the scientific man should not be a witness at all, but a juror, or it may be a judge? These and such like are among the considerations which must be taken into account. Clear it is that this matter of science, if it be, indeed, a reproach and embarrassment to the Courts, is not too large or difficult for the law; nor was the Roman lawyer mistaken when, with lofty ideas of his calling, he defined jurisprudence to be "*divinarum atque humanarum rerum notitia, justi atque injusti scientia.*"

Perhaps the most useful manner in which, at this period of the controversy, I can re-open the subject is, by briefly reviewing the discussion that has already taken place, and of which we have reliable reports in duly accredited publications. But I beg to be allowed a few preliminary remarks.

When this subject was last before the Society, it appeared to me that it had not been sufficiently considered, more especially with reference to its strictly legal bearings. So far as I could understand, a great deal was said about science, and scientific evidence, and scientific assessors, and a number of speculations were offered, having, as it appeared to me, a mere regard to these particulars. But I could not see how, what was said on these subjects was intended to qualify the one great question, viz., the proper form and order of the trial. I say the *trial*, for, with great deference, what we have chiefly to consider is not a mere matter of science or of scientific evidence; it is a question as to how we are to deal, not only with science strictly so called, but with all kinds of peculiar knowledge and skill when we require their aid for the purpose of determining right and justice between litigants; in other words, it is a question as to how we are to make the knowledge and skill of persons in particular departments of life available in the administration of the law. Science and scientific men, no doubt, come largely and perhaps chiefly under this category, but there are others in the same situation. The evidence of skilled tradesmen, of foreign lawyers, of doctors and surgeons, and, in short, of all who, by profession or calling, or by the accumulation of particular knowledge and experience in any recognised business, have established for themselves a certain reputation, are as much experts as the strictest and the most gifted of scientific men, and entitled to as much consideration. In fact, skilled evidence, that is, the evidence of skilled opinion, whether taken as matter of fact, as in the case of foreign law, or of mere opinion, must, as it appears to me, be all taken in the same way; and what we want, therefore, is not so much to hedge round science and its

votaries with any protective device, but such a procedure at the trial as will best, most justly, and most completely, give effect to the evidence which the parties have adduced, whether that evidence be purely scientific or skilled testimony, or be mixed with other evidence relating to the facts in dispute. This was, I think, the real question for our consideration, and it is a question rather for the legal than for the scientific man.

But now to the former discussion referred to. As the Society is aware, that discussion arose in consequence of the conflicting medical evidence that was given at the trial of Dr. Smethurst for murder, in the autumn of 1859; and it was at first conducted with the greatest violence and acrimony, the newspapers of the day being inundated with letters all more or less distinguished by these ungenial qualities; "*Medicus*," "*Justitia*," "*Lex*," "*Veritas*," "*Scientia*," and various other *nommes de plume*, being the signatures under which the vituperative missives were published. But it does not appear that the lawyers were much excited; they rather seem to have considered that the quarrel having been made by the doctors, these gentlemen had better settle it among themselves. And here I must observe, that, if the matter of *procedure*, on which the discussion is now brought to bear, had been left to be considered with reference to the trial in question, nothing could have been more unjust or more unreasonable than to have preferred any complaint on that score; for, whatever may have been thought of the verdict, the trial itself was, from beginning to end, and with reference to all the evidence, and all the witnesses, a perfectly fair one.

I have heard it said that medical men in general make bad witnesses, and that they generally contrast unfavourably in this respect with soldiers—a remark that may be quite intelligible without any necessary disparagement of our medical friends in the estimation at least of those who are acquainted with their professional idiosyncrasy—an idiosyncrasy which, however intellectual and philosophical, and medical, is just of the kind which, in the interest of the public, is, perhaps

all the better for that gentle and particular restraint which legal procedure now and then imposes upon it. The doctors were allowed, however, full play in the newspapers; and if they gradually got less excited, they became more serious and prolix, and the medical periodicals became very learned on the subject of medical and scientific evidence. Whether much light was thus thrown on what we lawyers call *evidence*, I do not suggest, but unquestionably a very great deal of cleverness and ingenuity was exhibited. Of course, there was no difficulty in removing the stage of the question from Smethurst's trial to the general platform of science at large: and one of the most conspicuous essays of the kind to which I alluded, was a paper read before various learned bodies, and in particular before the Society of Arts, on the 18th January, 1860, Vice-Chancellor Wood being in the chair, by Dr. R. Angus Smith, F.R.S., entitled, "Science in our Courts of Law." The paper was published in the number of the Journal of the Society of Arts for January, 1860, along with a report of the discussions that followed upon it, and it is a very long one. It is divided into numerous heads; and it would be idle for me to attempt to give anything like a *resumé*, however brief, of its actual contents. Nor is it necessary, for, while it suggests a number of important considerations, I cannot say, after a most careful perusal, that it assists us much in discussing the subject of my present remarks; while its more dogmatic statements could be easily proved to be erroneous, even if its peculiar style of composition was more favourable than it is to the communication of dogmatic truth. It is extremely metaphysical—and I had almost said eccentric.

The Society will pardon me if I give one or two illustrations of Dr. Smith's misconception of the subject. He observes:

"We see science moving with irresistible force, gradually seizing more and more of the rights and properties of every subject, and of every government, whilst the scientific man, the expounder of science, has no recognised place, but is allowed to give his evidence

as a necessity, and frequently in a manner that might be shown to be as illegal as it is for the time unavoidable."

What the Doctor means, in this very hazy sentence, about "evidence as a necessity," and yet "illegal," albeit "unavoidable," I cannot surmise; but we all know that medical and scientific evidence, which is always highly paid for, must be a necessity where it is judicially required; and that if it is not legal, it is not evidence at all. The Doctor proceeds to observe :

"That physical science is the ultimate referee in cases where it can give a clear answer, and that suitable arrangements should be made for obtaining the unprejudiced opinion of those who have studied it.

"That in all differences of opinion, whether in social or physical law, and in all difficult cases, the instincts of man, in a free country, will take the lead (right or wrong)."

The first of these points of course contains the abstract truth; but the obvious comment is that, as science is impersonal and cannot speak under the circumstances supposed, we must do our best in the witness-box with its human professors; and that in order to obtain that "clear answer," which it, that is science itself, if we could only subpoena it, could give, we must investigate, by examination and cross-examination, these professors' opinions. The Doctor himself seems to have had something of the same kind of misgiving in his mind, because he shortly afterwards admits that, "science is liable to be expounded by its teachers pedantically and imperfectly," and when he further on declares that "the public must expect a great deal of opposition among scientists." The second point I have quoted above is, I confess, to me not quite intelligible; for what he means by "the instinct of man in a free country taking the lead (right or wrong)," I do not see, unless, "by the instinct of man in a free country," we are to understand him to refer to the *jury*, "and by taking the lead (right or wrong)," to the *verdict*, whether it be correct, or one that "serves him right," which, of course, is generally wrong.

Again, Dr. Smith remarks :

“ Even supposing a witness to insist, as some will do, on giving all his fullest evidence, it is scarcely possible to avoid having it distorted by the examining party. One trifling remark may be so examined, and so much questioning may be spent upon it, that it takes the place with the jury and the public of an important point. On the other hand, a most important remark is passed over in silence. Now this destroys the due proportions given to the evidence in the mind of the scientist.”

The fallacy in this quotation is transparent. The importance of the witnesses' remarks is, of course, not to be viewed with reference to the matter of science in hand, but with reference to the issue in fact under trial, and to the true answer to which the scientific evidence is intended to lead ; and it is only evidence so far as it is introduced by the interrogatories in Court. As to the “ due proportion given to the evidence in the mind of the scientist being destroyed,” it really matters not whether it be so—the mind of the scientist has nothing to do with the question—it is the mind of justice, and of the law in relation to the question of right before the Court, which is the real consideration.

These and many other illustrations of the same kind, which I could give from this very singular paper, show that Dr. Smith misconceived the nature of evidence, and the legal position of a witness in a court of justice.

His general position appears to be this, that a scientific witness, or a scientific man, or a scientist, as he delights to call him, is not to be controlled by counsel at all ; in fact, is not to be examined by them, at least, in the first instance. He, as a scientific man, would ignore the Bar, and hold converse only with the judge, speaking what he likes and when he likes—a mode of proceeding, however, which I fear would make trials, involving the consideration of scientific evidence, very unedifying indeed.

The whole paper, although, as I have said, very clever, very

elaborate, and probably very subtle, is, in my humble judgment, a most unsatisfactory exposition, even if its peculiar and rather dreamy phraseology were of a more palpable character than it is. The best part of it is where, towards the end, Dr. Smith speaks of the remedy he proposes: the first point of which relates to the appointment of an assessor, and the second, to the mode in which a scientific witness ought to be examined; but the third is, I think, deserving of serious consideration. It is as follows:

“That scientific men giving evidence on scientific points shall be allowed to deliver their examinations in writing. The reading and elucidation to be controlled by the judge; examination and cross-examination by the barrister to follow.”

This proposal was thought so much of by the Rev. Vernon Harcourt (a gentleman who appears to have taken great interest in this subject), that he introduced it into a proposed Parliamentary Bill, which he drew up on the regulation of scientific evidence. He appears to have borrowed the idea from the examination of medical witnesses in Scotch criminal courts. But as I can attest from my own personal experience in these courts, that proceeding is not always attended with complete success. I have a very distinct recollection of being present at an Assize Court in Scotland, when one of the most distinguished surgeons of the present day was examined in the manner explained. He came, of course, with his report on the *Corpus delicti*. It was a very precise and distinct document; and, although he read it very badly, it made a great impression on the Court. Unfortunately, however, for the learned and distinguished professor (for he was a professor), the prisoner's counsel availed himself of the privilege of cross-examining him on his report; and I am really concerned to inform the Society that he succeeded too well in utterly destroying the weight of the professor's evidence, by the contradiction and general mess in which he involved him, and of which, in a spirit of great disrespect, he fully

availed himself in the very unreserved observations he afterwards addressed to the jury on the painful subject. I am very much afraid that if the distinguished professor, who is also a very learned and able author, had sat down, immediately after the forensic exhibition I have described, to write an essay on Medical Evidence, he would have written even more sternly and indignantly than Dr. Angus Smith has done. The incident I have related, however, shows the danger of allowing such examinations and cross-examinations without due regulation ; and on this subject I shall, before I conclude this paper, make a suggestion as to the control under which *nisi prius* and Old Bailey advocacy should be placed in any amendment of procedure that may be adopted.

In the discussion which followed the reading of this paper by Dr. Smith, some very interesting and useful remarks appear to have been made by our learned colleague, Mr. Thos. Webster, Dr. Taylor, and others present. Dr. Taylor mentioned a circumstance of great importance, and which it is hoped may be kept in view in any reform which may take place hereafter. He stated :

“ That the differences amongst scientific men were rather those of opinion than of fact ; and from his own experience, which had been considerable, he knew that facts were often laid before them in such a manner that they had not a half even—if they had a quarter—of the truth of the case. It had occurred to himself upon many trials, both in cases of patent rights, and of murder, involving questions of the greatest importance to society, that, for the first time, he heard in the court facts which would have materially altered his opinion ; so that scientific men were entirely at the mercy of those who instructed.”

The Chairman, Vice-Chancellor Wood, summed up the discussion, observing that the great difficulty in such evidence was the evidence of opinion, and, in illustration of this, he mentioned,

‘ That, in a case which came before him, six of the most eminent



members of the Scottish Bar gave evidence upon a question of Scottish law—three on one side and three on the other. The question referred to a matter connected with the Free Kirk, and diametrically opposite opinions were given as to what the Scotch law was ; the opinion in each case coinciding with the particular religious views of the witness ; and yet in this case perfectly honest opinions had been given.”

Dr. Smith's paper had, previously to its having been read before the Society of Arts, been communicated to this Society, and I find that at our meeting of the 28th November, 1859, a committee was appointed to consider the subject, and on the 20th February, 1860, the committee's report was read. It will be found on page lx. of the *Law Amendment Journal*. This report in substance recommends that there should be no change in the existing procedure. The committee are against “any change in the existing mode of taking evidence, at least until some plan had been proposed of which the advantages would be clear, and which should work harmoniously with the rest of our legal system;” and they express their opinion that to none of the suggestions by scientific men that had been laid before them did this character apply. Some of these suggestions, they observe, were entirely nugatory, and others opposed to the whole spirit of our jurisprudence, or would introduce an element of confusion, of which it would be impossible to calculate the result. The report is also against requiring scientific evidence being given in writing, and also against scientific assessors; and the committee wind up by stating they see no reason for making any distinction between civil and criminal cases. As a whole, the report, which appears to have been the last serious expression of opinion by the Society, is distinguished by a candour and lawyerlike discrimination most creditable to its authors; and it is impossible to read it without a feeling of respect for the good sense and sound judgment which evidently guided its preparation; and, for myself, I must say that I very much sympathize with it.

The other medical and scientific gentlemen who have dis-

cussed this subject are Professor Christison, of Edinburgh, Dr. Letheby, and the reverend gentleman I have before referred to, the Rev. Vernon Harcourt.

Mr. Webster's paper, read here on the 18th of last month, again brought up the subject before us; and in a leading article of *Newton's London Journal of Arts and Sciences*, published on the 1st of this month, Mr. Webster's views are enforced.

I believe I correctly describe the discussion which has thus taken place by stating that, as it at present stands, it limits the consideration of any change to the proposal to appoint scientific assessors, and, in certain cases, to the modification of the trial by jury. But the controversy so stated involves other elements of consideration, and I shall now submit to the Society the outlines of such a reform as, in my judgment, would meet any difficulty or inconvenience experienced under the existing system of taking this kind of evidence.

We must take care, however, to regard the subject from the true point of view. We shall not do so, if we look at it as a mere question of *evidence*, or even of evidence in relation to *science and skill*. The real and great question is, *how shall the issue be tried?*—for after the evidence has been given, and over and above it, there is the matter, the paramount matter, of *right* and justice, and how shall *that* be determined? The question, then, I say, is, *how shall the issue be tried?* Now this is a lawyer's question, and a lawyer's question exclusively; one to which Doctors of Medicine, and scientists as they are called, and experts in general, have nothing to say. After the discussion we have had, and under all the circumstances in which the question has been raised, it must be held to go to the very constitution of the existing tribunals themselves, and even to exclude the capacity of its highest officials. Are then our judges and juries of the present day, according to the theory of their qualifications, equal to this kind of business? If they are not, then either they themselves individually or the law and practice of their courts are at fault. But if they are, then scientific men and experts must not, in the

capacity of assessors or jurors, invade the bench or jury-box, but must be content to assist the Court by their evidence.

I had occasion to consider this subject many years ago, in Scotland, chiefly with reference to a proposal to have science in such cases represented in the constitution of the jury; but, in my opinion, there is no substantial difference between the cases of jurors and assessors; and the argument equally applies for or against the two positions. The whole question was, I recollect, very anxiously considered, and I explained my views in a statement I communicated to one of the legal publications of the day, on the complaints that were then made in Scotland against the system of trial by jury in civil causes; and among which complaints the system of pleading and the method of deriving and settling issues, held a principal place. As the opinions expressed in the paper referred to are still held by me, perhaps the Society will allow me here to read a few sentences from it:

“ The complaints, however, that are sometimes heard in Scotland on this subject, do not argue a clear idea of the juror's office, which they confound with that of the witness. Evidence, especially where it is progressive and in detail, is one thing; the juror's understanding, to which that evidence is addressed, and by which the whole is to be brought to one general result in the suit, is another. Herein lies the error of those who object to juries; not because they are generally uninformed, but in consequence of their wanting in particular cases that artificial kind of knowledge which skill in a trade or profession can give. Now we think this is not only to take a wrong view of the jury's province, but to prevent the evidence from being fairly or impartially considered. We must give the jury all legal and relevant aids; and if a scientific or artistic point arises, we must, by the testimony of scientific men and artists, throw all the light we can on the issue; but that issue it is the sole duty of the unprejudiced jury to satisfy. The jury are to take cognizance of all the evidence: of scientific and technical evidence as well as evidence of the fact; they are to entertain everything which the law allows; and by allowing, requires them

to know, that they may form a true judgment on the disputed right. *Ad questionem facti respondent juratores, ad questiones juris respondent judices.* Between these two provinces there is no middle authority ; the jury are to try the fact ; the judge to lay down the law ; but the fact is to be considered with reference to the right or interest in issue. Keeping these principles in view, we discern the real nature of the jury's social and judicial constitution. A jury should be in all respects quite indifferent. The juror is a judge, not a witness ; and he is to decide on information afforded by competent persons, and not from any independent views of his own. That is to say, he is to decide on evidence ; evidence external to his own intuitive knowledge. And anything that interferes with this constitutional relation, whether it be an influence emanating from inherent qualities in the juror individually, or in some other way, by which a bias is created in his mind, so far deranges proper judicial order. In short, the true ideal of a jury is, that they are to proceed to their duty without any presumptive impression as regards one side or the other."

A Scotch case, involving a good deal of the evidence of the kind in question had occurred, and it was complained that,

"Not one coalmaster or mining engineer was on the jury. But this is no good objection. The kind of information which such classes of persons were fitted to supply was purely matter of evidence, and the witness-box, and not the jury-box, was their true place. Their professional skill was not substantially and *per se* in issue, but was merely collateral, and receivable in evidence in order to instruct the minds of the jury on the fact, as that relates to the interest, the right or the wrong, in litigation. And if it is necessary to know about coal driving, and mining, and engineering, by all means let the jury be duly indoctrinated therewith. Put the collier, and the miner, and the engineer into the box ; examine them well and thoroughly ; try and search the depths of their scientific and professional minds, and then dismiss them with thanks for their information ; but do not allow them to interfere further with the case, else the collier may make it too black, the miner may take too much out of it, and the engineer may blow it up altogether ! There

is something more to be done ; there is a general conclusion to which, among other particulars, the scientific evidence is merely inductive ; and although colliers, and miners, and engineers may know a great deal about, and be most useful men in their respective crafts and trades, they may not be the most competent persons for the protection of an interest, the vindication of a right, or the redress of a wrong."

I still entertain these opinions very strongly, and as I have suggested, the argument applies as well to assessors as to jurors ; perhaps indeed more forcibly in the case of the former, for, with the notorious bias and jealousy that prevail among scientific persons and persons of skill, from the mere mechanic or skilled artisan up to the Prince-engineer, to have two such assessors sitting with the judge would, I think, involve a hazardous experiment, not only in relation to the authority and dignity of the judicial office, but also with respect to that feeling of confidence in the impartiality and indifference of the judge, which in this country is associated in the mind of the public and the Bar with the efficiency and integrity of the Bench, and which feeling of confidence it would be dangerous to disturb. I therefore entirely concur in the report of this Society, to which I have referred wherein it is stated :

"According to that scheme, assessors should be appointed who should sit with the judge, and should be bound to give their opinion in public, as well as the reasons on which that opinion was formed, the judge, however, not to be bound by the opinion so given. It must be supposed that the assessors would be persons of competent skill ; and it is difficult to understand how the judge would not be morally, if not legally, bound by their opinion, or that any verdict could be supported which went against such opinion. Nor can it be doubted that, if any difference of opinion arose between the judge and the assessors on a matter which the jury must ultimately determine, the latter would be placed in a position of considerable embarrassment. In trials before the Admiralty Court, where the judge is assisted by Masters of the Trinity House, there is no jury ; and after carefully considering the working of the system adopted

in that court, we are of opinion that it is altogether inapplicable to the ordinary mode of trial by jury."

The plan of assessors is further objectionable, inasmuch as it would introduce a lay quality into the judicial element that would hamper the judge, interfere with his discretion, and cause confusion in the trial.

It has also an aspect suggestive of something unconstitutional, by neutralizing or tending to neutralize that undivided responsibility in the judge which is one of the chief safeguards which our legal system affords to the nation.

In every view this proposal for assessors appears to me most objectionable. It is, in my judgment, so inconsiderate and wrong, that it is a satisfaction to me to reflect that it was originated by medical, scientific, and other persons who, from their position and calling, are unacquainted with the delicate character of the conditions of legal procedure, and not from our own profession. Indeed, I say it with all respect and deference, that the proposal is unlawyerlike, because it appears to me to take a low and unworthy estimate of the comprehensive nature of the principles of jurisprudence—the greatest and grandest of all sciences; and I sincerely trust that the impression which it appears to have made on some of the lawyers of this Society may be but transient—that it may speedily pass away altogether, and give place to sounder and juster, and, I may add, more manly notions of legal investigation. I therefore hope and trust that the Society will adhere to its former opinion on this subject, and negative this scheme of assessors.

But, while I am so strongly opposed to scientific assessors and scientific jurors, I am not insensible—it is impossible to be insensible—to the inconvenience that has been experienced in taking scientific evidence, and which will probably continue to be experienced unless some well considered change is made in this respect.

I cannot help thinking however that if trials, especially trials at law, were conducted with a little more consideration and reserve—I had almost said reticence—on the part of counsel,

and with less of that demonstrative anxiety and burly dogmatism of tone and manner by which advocacy, in its more scrupulous development, is too often disagreeably distinguished in our courts,—I say, if there were a better condition of things at nisi prius and the Old Bailey, and if such trials as I have referred to were a little more gentlemanlike, and a little more scholarlike, we should hear less than we do of the evils and drawbacks of the existing system.

But, making every allowance, I still think there is room for improvement, although I trust that the Society will not for one instant admit Dr. Smith's claim that the scientific witness shall occupy at the trial an "independent position," as he calls it. That would never do. The scientific man or the expert, when called on to assist in the administration of right and justice, to use the words of the great charter, must do so as a *witness*, and a witness only—a witness in the ordinary sense of the term. But his services might be considerably enhanced by one or two regulations, to be applied with a due regard to the special nature of the case to be tried. It has been complained, as one cause of the dissatisfaction with this kind of evidence, that the scientific witness often gives it without adequate information respecting the facts in dispute; and it had been suggested that, for the purpose of such evidence at least, the facts should be previously communicated to the witness *in writing*. The answer to this, however, is a forcible one, namely, that many important facts to which the scientific witness may have to speak cannot be known until they are disclosed orally at the trial. Yet, I think, the suggestion made is worthy of the best consideration, and it might be regulated so as to be used with advantage in particular cases. On this subject I venture to propose as follows:—

1st. That rules be adopted by which both parties should be bound, by the form of their pleadings, and other matter of record, fully to disclose the case they are respectively to make at the trial.

2nd. That a written statement, taken from the pleadings, and other matter as may be agreed on, and expressed in as popular language as possible, should, previous to the trial, be adjusted and settled in the presence of both parties, before the judge himself, or his principal registrar, or some other proper officer.

3rd. That an office copy of this statement be furnished to each scientific witness or expert, at a certain time before the trial, and that at the trial the scientific witness or expert should be required to give his evidence with reference to such statement. This would, however, not exclude any relevant amplification at the hands of counsel, care at the same time being taken that the material facts stated are neither added to nor contradicted, the object being that, whatever may transpire at the trial, the evidence of the expert or scientific witness shall still run in the channel indicated by the statement of the facts.

4th. I propose that in certain cases, to be discriminated and regulated, the scientific witness or expert should, so instructed as to the facts, be allowed to give his evidence *in writing*; care being taken by, if necessary, a strict preliminary examination, that the written evidence he puts in expresses fully and conscientiously his mind on the subject. In this written evidence, I would allow the witness to be further examined and cross-examined orally at the trial, but only in the way of explanation, and not so as to affect the witness's credibility.

5th. Where, notwithstanding all these precautions (and others that might perhaps be adopted), there still remains a serious conflict of opinion between or among scientific witnesses and experts, if there are more than two, it might be expedient to adjourn the trial, and that, in the meantime, these witnesses should exchange each others written evidence, meet together and confer together; and, when the trial is resumed, that they should respectively state to the Court whether, and in what respects, their former evidence has been



affected or qualified. I would not then allow any further examination or cross-examination, excepting with the express leave of the Court, on cause shewn; and,

6th. I propose that no new trial should be allowed on the ground of the verdict being against the weight of the scientific or the skilled evidence, nor on any ground involving a rehearing of such evidence; and it might be convenient, in particular cases, that a power should be reserved to the Court to order the scientific or skilled evidence, or the material parts of it, to be entered as facts on the *postea* at law, or in the return of the verdict in equity.

Other rules and regulations might be made with a view of making this kind of evidence more conducive to the ends of justice in our courts than it is considered to be at present. But the above proposals are the result of the most anxious consideration on my part, and I respectfully submit them to the Society.

It will have been observed that I have made no distinction between the cases where the evidence is purely and exclusively scientific, and where it is of a mixed nature. I was at one time disposed to think that the regulations in the former case might be different from those to be adopted in the latter; but on further consideration I think it better that the rules should be the same in the one case as in the other.

In either case the result must be the determination of a question of fact or of right, which is best left to the verdict of a jury.

NOTE.—The above paper is confined, as will have been observed, to the general question of scientific evidence and the evidence of experts, and does not particularize the special case of the trial of patent rights. It is the opinion of many lawyers that these latter require amendment in the procedure of an exceptional kind; and Mr. Thomas Webster has proposed, in a paper he read before the Law Amendment Society, on the 18th of May last, that in such cases there should be scientific assessors to sit with and assist the judge; and that the mode of trial, whether by jury or by the Court alone, should be left to the option of the parties, under regulation as to the nature and circumstances of each particular case. For myself, I confess I am opposed to assessors in all cases—although I can quite understand that the infringement of a patent might often be better tried without a jury.—R. S.

#### ART. IV.—ON AMERICAN SECESSION AND STATE RIGHTS.

**T**HE secession of the Confederate States from the American Union is a fact which cannot be denied, but a question exists in the minds of many men whether this act be illegal or not. The Northern States maintain that the act of secession is an act of rebellion, and therefore illegal; the Southern States maintain the contrary—each justifies its views by an appeal to arms, which, after all, cannot really decide the question upon its merits. The object of the following observations is to place the matter in a clearer light.

Is secession rebellion? To decide this question we must first ascertain what is the legal definition of the term rebellion, and next whether the Secessionist falls within such definition or not?

Vattel, in his *Droit des Gens*, liv. 3. s. 288, says, “The name of rebels is given to all subjects who unlawfully take up arms against the ruler of the society, whether their view be to deprive him of the supreme authority or to resist his commands in some particular instance, and to impose conditions on him.”

Jacobs (*Law Dictionary*) says it is “the taking up of arms traitorously against the king by his subjects.”

Bouvier, in his *American Law Dictionary*, adopts, with slight modifications the definitions of Vattel and Jacobs. The principle of these definitions is to be found in the writings of Hale, Hawkins, Staundforde, and other English lawyers of repute, under the title “High Treason;” also in the *Corpus Juris Civilis*, under the title “Ad Legem Juliam Majestatis.”

The celebrated German jurist, Feuerbach, in his work *Lehrbuch des Peinlichen Rechts*, sect. 162 and seq., thus describes rebellion:

“Hochverrath (*perduellio*) ist die Handlung eines Staats-

unterthaus, welcher an sich und in der rechtswidrigen Absicht des Handelnden darauf gerichtet ist, das daseyn des Staats oder solche Einrichtungen desselben, welche durch das Wesen des Staats überhaupt bestimmt sind, zu vernichten." He wrote a special work on this subject.

The Italian jurist, P. M. Renazzi, in his *Synopsis Elementorum Juris Criminalis*, lib. 4, sec. 38, speaking of rebellion, says:—

"Duo autem ad hujusmodi crimen contrahendum requiruntur, tum ut quid fiat adversus principem vel populum, qui magestate præditus sit, seu polleat summo imperio; tum ut fiat ab eo, qui illi subditus sit sive naturâ, quia natus in ejusdem territorio, sive jure, quia in civitatem receptus, aut bello subactus." See also the *Code Penal of France*; the *Penal Code of New York*, s. 8; and *Livingston's Code*, tit. "Treason," to the like effect.

The American law on treason and rebellion does not differ essentially from its English source. This principle runs through all the definitions, that to constitute rebellion there must be a sovereign authority on the one hand, and a subject on the other, making warlike resistance with intent to subvert such authority.

Assuming these definitions of rebellion to be sufficiently correct and uniform, the next inquiry is whether the Secessionist falls within them or not. It is clear that none but *natural* persons can be rebels; artificial ones cannot. States are bodies politic, and therefore moral or artificial persons (Vattel, liv. præl., ss. 1 & 4); and that the states of North America, both individually and unitedly, are such, is put by American judicial decision, and the opinions of American jurists, beyond dispute. (1 Marsh, Dec. 177; 3 Dall. 447; *U. S. v. Tingey*, 5 Pet. 115; *U. S. v. Baker*, Paines R. 156.) Hence the term "Rebel States" applied to the secessionist states by the Northern ones in their official correspondence and documents involves a legal error. It also involves a legal absurdity in this, that every rebel implies a capacity not only of being indicted for the offence of rebellion, but also, in

case of conviction, of being hung or otherwise executed for the same; which, in the case of an artificial person like a state, is simply impossible.

The question of rebellion, therefore, is one referring not to the state, but to the individual as the criminal; the question of secession from the Union refers to the state rather than the individual; and the question whether a Secessionist (that is, he who combines with others to bring about secession of the States from the Federation) be a rebel or not depends upon the doctrine of state sovereignty. Secession is the withdrawal of a State from the Federation, and if that State be a sovereign power, the act of secession is a sovereign act incapable, as hereafter shown, of *legal* limitation, and may be exercised by the sovereign power at its option. A federal compact to which sovereigns are parties may be terminated by any one of them at pleasure, and any question arising therefrom, being a question between sovereign powers, must be settled by international law, and not by the *jus civile*, or law of a state.

There has long existed in America a political party or section who maintain the dogma of an American nationality, *one and indivisible*, springing from the whole people of the Union, in opposition to those who assert that the nationality is a *composite* nationality, springing from a federation of sovereign states; or, as Mr. Wheaton terms it, in his *Elements of International Law*, p. 57, a "*composite state springing from a league*." That the latter position is the true one will be proved by the following short historical sketch of the growth of state sovereignty, and by the nature of the federation itself. The reader is requested to notice particularly the position assumed by the States, in reference to the three great events of American history, viz., the Act of Independence; the Articles of Confederation of 1777, and the Federal Constitution of 1788, and to judge for himself whether such position was other than that of sovereign independent powers.

Before the outbreak of the American revolution, the colonies

were subject to the British crown and laws, and so far the American subjects by the act of insurrection became rebels. Then came the Act of Independence—an act of the States, and not of individuals, and it was achieved, according to Bancroft (c. 70), in this wise—On the 1st July, 1776, the resolution of independence was proposed in congress of delegates of all the States at Philadelphia. It was sustained by only *nine* of the thirteen States. The delegates of New York State, though present, refused to vote, and withheld their concurrence to a subsequent period. The vote of South Carolina was “unanimously” in the negative. Pennsylvania voted also negatively by a majority of four to three of its delegates; and Delaware was equally divided by its two delegates present. The resolution was then reported upon, but the determination upon it was “put off” to the following day, when the dissenting colonies were thus “squared.” The voting was taken afresh. Delaware’s third member, who had been absent, was “whipped up,” and voted for the Declaration, thus giving a majority of one to that state. Two out of the four Pennsylvanian delegates who voted *against* the Declaration on the first, stayed away on the second, and thus enabled the three in minority on the first, to be in majority in the voting on the second. South Carolina, “for the sake of unanimity, came round,” but New York never voted at all, nor did she on the fourth (two days after) vote for the Declaration of Independence. This Declaration was signed by the different delegates, who affixed their signatures opposite the names of their respective states. Thus Benjamin Franklin and his eight colleagues, delegated by Pennsylvania, put their names opposite the name of that state; Thomas Jefferson and his six colleagues, delegated by Virginia, signed opposite the name of Virginia; and so on with the rest of the states.

In 1776 arose that grand political division of parties into Federalists and Anti-federalists, which has prevailed with varying strength and intensity to the present day. The

Federalists (*see* 5 Marshall's *Life of Washington*, p. 33) sought to aggrandize the power of the central government of the federation at the expense of the power of the several states governments. The Anti-federalists, as their opponents, maintained state independence and sovereignty against central aggrandizement.

The opinions of the Federalists are exemplified by Mr. Justice Story, in his work on the *American Constitution*, sec. 211. He there asserts, that this Declaration of Independence "was not an act done by the state governments nor by persons chosen by them, but by the whole people of the United Colonies, by the instrumentality of their representatives. The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this Declaration." Mr. J. Quincy Adams, in his oration of the 4th of July, 1831, Dr. Rush, and many others, have maintained the like opinions. Their object was to prove the establishment of one great indivisible nationality by the Declaration of Independence, thus aiming a blow, *in limine*, at the independent sovereignty of the several states. But to maintain that the Act of Independence was an Act of the "whole people of the United Colonies," viewed as a unit or indivisible whole, is to contend against fact. First, the Declaration itself was that of the "representatives of the several United States of America in general congress assembled," declaring that those states were "free and independent states;" and that, as free and independent states, they had full power to levy war, &c., "and to do all other things which independent states may of right do." In support of which declaration they "mutually pledge each other." The representatives signed the Declaration as representatives of the states opposite their signatures, and which delegated them so to act, and in no other capacity—certainly not as representatives of other states which never authorised them to

7. The expression "United States," means states in union, imply implies a combination or composition of states.

The term "free and independent states" supports this view ; and the "mutual pledging," is the mutual guarantee of equal states, and not of the "whole people of the Union," which as a unit could not guarantee itself. Moreover, the whole people of the United Colonies were not represented, inasmuch as New York was no party to the Declaration, whatever she did subsequently. To support Mr. J. Story's view, we must suppose the act of the "whole people" of the states to have been done "*uno flatu*," which was not the case. The assertion that "the separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed the Declaration," is sufficiently refuted by the fact that the framer of the Declaration was Thomas Jefferson, the staunchest supporter of state sovereignty from the commencement to the end of his illustrious political career, and whose opinions, in the matter of state rights, have more strongly influenced his countrymen even to the present time, than any other American statesmen, not excluding Washington. Added to this, the judicial opinions of the supreme courts of the United States have adjudged that thirteen sovereignties sprang into existence by the Declaration of Independence. (*Chisholme and others v. The State of Georgia*, 3 Dallas Rep. decided in 1793; see also *Ogden v. Gibbons*, 9 Wheaton's Rep.) Several of the states had framed constitutions before and after the Declaration. Thus Virginia framed one in June, 1776; New Hampshire in December, 1775; New Jersey in July, 1776; and South Carolina in March, 1776; and those Constitutions all subsisted in full force and operation long after the Declaration was executed: some are still subsisting; others have been repealed by substitutes; many have been amended, frequently in essential particulars—all which matters go in proof of the independent sovereign action of the several states, and in disproof of superior central sovereign power. The congress which passed the Declaration was founded on a resolution of the Massachusetts Assembly, passed on the 6th of June,

1765, to the effect that it was expedient that a general congress of deputies from all the Lower Houses of Assembly in the colonies, be held to consult on their grievances. The first congress met at New York, on the 1st of October, 1765. From that time till the Declaration of Independence, the deputies could not be considered as representatives of a national government, but merely as deputies of rebel states. After the Declaration, the powers of congress were enlarged, but the members were still mere state deputies.

Between the times of signing the Declaration of Independence and the Articles of Confederation, about two years, the congress of state delegates certainly did many acts of a sovereign nature, which were not within the scope of their delegated powers, but which the urgency of the case rendered necessary and excusable (*Penhallow v. Deane*, 3 Dallas Rep.)—an urgency, however, which did not prove their right.

This congress was an assembly of state delegates, formed for the purpose of carrying on the War of Independence. There was then no federal union subsisting between the states such as existed under the articles of confederation and the constitution.

The articles of confederation were agreed to “by the delegates of the states affixed to their names,” assembled in congress, on the 15th of November, 1777, the articles themselves bearing date the 9th of July, 1778. These articles were founded upon a resolution of congress, passed in June, 1776, to the effect that “a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies.” The draft of the articles with a circular letter were sent by congress to the different states, requesting them respectively to authorize their delegates in congress to subscribe the same on behalf of the state, the articles being “earnestly recommended to the immediate and dispassionate attention of the legislatures of the respective states.” It is clear that the above resolution of June, 1776, although passed prior to the Declaration of Independence, must have



had reference to the formation of a confederation inconsistent with colonial dependence on Britain.

The very appeal of congress to the states, urging them to consent to subscription of the articles by their respective delegates, is antagonistic to the assumption of sovereign supremacy in the congress at this time, and to the existence of an indivisible nationality. Moreover, the ratification of the articles by the respective states was not simultaneous, for though the majority ratified in 1778, Delaware did not ratify till 1779, and Maryland till 1781—a tolerable proof of sovereign independence of the states. But the second article expressly declares that “each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in congress assembled.” It thus appears that the sum of sovereignty in each state up to the execution of the articles by such state was made up of those sovereign powers, jurisdictions, and rights, which it afterwards retained, and of those which it afterwards delegated. The delegated powers, &c., were therefore powers, &c., conferred by principals upon subordinate agents, and such as could be better exercised by the federal congress for federal purposes, than by the states individually.

The history of the United States of America under the articles of confederation afford a painful but irrefragable proof of state sovereignty. The powers vested in federal congress by the articles were undoubtedly sovereign powers, and yet the resolutions of congress, made in pursuance of those powers, and therefore constitutionally binding on the states as members of the federation, operated as “mere recommendations which the states observed or disregarded at their option.” The *Federalist* (Nos. 15 to 22) has vividly described that lamentable state of affairs which filled the minds of most American patriots, even of the good, the amiable, and hopeful George Washington, with despair. Each state seemed to have been actuated solely with the desire of shifting the

burden from its own back to that of its colleagues, and to that end each pulled a different way.

Mr. Chancellor Kent (Comm. p. 221, 8th edition,) says:

“In 1781 a report was made by a committee of congress for submitting to the states an amendment to the 13th article of the confederation then recently subscribed by all the states, in which amendment it was to be provided, that, in case of refusal or neglect of any one or more of the confederated states to abide by and obey the determinations of congress, in respect to requisitions of men and money, agreeably to the apportioned quotas, congress might employ the land and naval forces of the United States to compel compliance by the delinquent states, and to make distress of the property of such state and its citizens, and also prohibit and prevent their trade and commerce with other states and with foreign powers. Mr. Madison and even General Washington perceived the necessity of such a coercive federal power. (*The Madison Papers*, vol. i., pp. 81, 86, 88.) But the power was never formally proposed to the states, or granted; and if it had been, it never would or could have been executed, without leading to the destruction of the Union.”

The necessity for a more vigorous federal government called into existence the present Constitution, which was framed by the delegates in convention at Philadelphia of 12 of the 13 states; Rhode Island refusing to send any. The Constitution was dated and published on the 17th of September, 1787, was presented to Congress, and by that body submitted to the states for ratification pursuant to the 7th article of the Constitution, enacting that “the ratification of the convention of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.” It was not so ratified till nearly a year after, and then only by nine of the states; Virginia and New York hesitating for a time, North Carolina refusing to ratify till November, 1789, and Rhode Island till May, 1790. In truth, there was no unanimity among them. Rhode Island and North Carolina only gave in their adhesion when congress proceeded to enact

“that their manufactures should be considered as foreign, and that the import and tonnage dues should extend to them;” a proof not only of the independent sovereignty of such refractory states (*Fed.* 43), but of the assumed right of the rest to exclude them from the federation, which they could not have done had the “whole people of the Union” been an indivisible nation.

After all the states had eventually ratified the Constitution, their jealousy of the growing power of the central government still subsisted. Although Washington’s letter in convention of the 17th of September, 1787, to the President of the Congress, stated it was “obviously impracticable in the federal government of the states to secure all rights of independent sovereignty to each and yet provide for the interest and safety of all,” yet the anxiety of the states to preserve their sovereign rights and to prevent misconstruction and abuse of congressional powers, caused further declaratory and restrictive clauses to be subsequently added by way of amendments to the Constitution, particularly article 9, whereby “the enumeration the Constitution of certain rights should not be construed to deny or disparage others retained by the people;” and art. 10, whereby “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, were to be reserved to the states respectively or to the people.”

The 9th clause was probably introduced to prevent a misapplication of the well known maxim of law, that an affirmative in some cases implies a negative in all others and *è converso*. (*Fed.* 83, 84. *Cohens v. Virginia*, 6 Wheaton’s Rep. Story Constit. 448.) This clause is very obscurely worded. There are “certain rights” enumerated in the Constitution which are not delegated as the right of each state to appoint electors under art. 2, and yet the “certain rights” in clause 9 seem only to refer to delegated rights. It cannot be affirmed with exactness what these “certain rights” are. At any rate, it seems clear that the rights retained are different from certain ones enumerated in the Constitution, and that such retained

rights shall not be prejudiced in their exercise by the enumeration of the "certain rights." The rights so enumerated probably refer to the delegated rights of congress, which comprise sovereign rights, as hereafter shown. The 10th clause speaks of powers reserved by and to the states individually, in contradistinction to those delegated by them to the federal government, and prohibited by the Constitution to the states individually, so that the reserved powers comprise all those not so delegated and prohibited, the essentials of a reserved power being non-delegation and non-prohibition. Thus, if a power be delegated but not prohibited, then it may be a reserved concurrent power; if prohibited but not delegated, then it may be a reserved power in abeyance; if both delegated and prohibited, then it is not a reserved but solely a delegated power; if neither delegated nor prohibited, then it is solely a reserved power.

These powers, jurisdictions, and rights must, prior to the ratification of the Constitution, have been vested in the states individually, for they were the parties delegating, and not the federal government, for that government only possessed delegated powers (art. 2), and *delegatus non potest delegare*. Moreover, as the whole of the thirteen confederated states did not simultaneously ratify, neither did they simultaneously delegate, the confederation was annulled by the act of the nine ratifying states which had seceded from it and formed a fresh federation. It cannot be supposed that they were bound by two federal governments at one and the same time, with a double set of presidents and representatives. As the purpose of the confederation, namely, mutual co-operation and assistance of thirteen states, was gone by the secession of nine of them, the remaining four were not bound to each other by the terms of the confederation. These four non-ratifying states might have remained in federation on the old footing, or continued as separate, independent and sovereign for ever, and then the powers which by their subsequent ratification of the Constitution they delegated to the central government would have indisputably remained

with them. When they ratified the Constitution, they joined a federal government already formed, and they delegated to it those powers which but for such ratification they must have exercised for themselves alone.

The powers so delegated by the sovereign states to the federal government comprised sovereign powers or powers of a sovereign nature—such as could only be properly exercised by a sovereign. Among them were the power of making treaties with foreign powers—of making laws for the general purposes of the Union, regulating coinage and currency—acquiring foreign territory, &c. The powers so reserved and retained by the sovereign states individually, and not delegated to the federal government, comprised sovereign powers, or powers of an equally sovereign nature as those above delegated. Thus the power of independent legislation by each state within its limits—the regulation of its internal commerce—independent legal jurisdiction—independent power as to the militia, the same as to taxes—power to pardon political offences in certain cases—not bound to enforce the criminal law of another state—the right of using military force to put down insurrections within its own limits, and also by the admitted principle that the delegation of certain sovereign powers to the central government was not necessarily exclusive as regards the possession or exercise of such powers by the states severally. The different civil, criminal, and commercial codes of New York,\* Louisiana, Virginia, and other states are examples in proof of state sovereignty, added to which are the different Constitutions of the states, altered and changed by and according to the will and pleasure of each state.

These facts in proof of state sovereignty apply to all the nine states which first ratified and established the Constitution, also to the four others of the original thirteen states which afterwards ratified. But since that time new states have sprung into existence and joined the Union. Vermont, for instance, seceded

\* "The sovereignty of the state resides in the people thereof."—*New York Polit. Code*, sec. 1.

from New York, of which it was part, in 1791, and in 1793 was admitted into the federal Union as an independent state. Several states, especially New Hampshire, Massachusetts, Connecticut, Rhode Island, New Jersey, and Maryland, encouraged, and all acknowledged this act of secession. Tennessee seceded from North Carolina in 1796, Kentucky from Virginia in 1792, Mississippi from Georgia in 1817, Alabama from Georgia in 1819, Maine from Massachusetts in 1820, Missouri from Louisiana in 1821. These various acts of secession from states were done with the knowledge, consent, and final approbation of the federal government.

As regards what are called the new states, such as Louisiana, Mississippi, Florida, &c., they were created states, and admitted as such into the federation, under art. 4, s. 3, of the Constitution. As soon as admitted, they stood upon the same footing as the other then united states, with precisely the same rights, powers, obligations, and duties, as proved by the resolutions of congress for admitting new states into the Union, and which are generally in the following form: "That the state of —— shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever." The fact that the territory of such new states in most cases belonged, prior to their creation, to the states collectively, as a species of partnership assets, and not to any one state in particular, does not at all affect the title of such new state to be considered upon admission equal in all political rights and duties to any of the original thirteen states. The nature of the federal Union also forbids the supposition that one state stands as regards the Union on a different footing to the rest. Texas, it is true, existed as an independent sovereign republic, acknowledged by the United States, prior to its joining the Union; the treaty or compact of union between the republic of Texas and that of the United States in 1845, was a treaty or compact of sovereigns foreign to each other, and by the terms of that treaty the sovereignty of the

republic of Texas was preserved, such sovereign powers being delegated by such republic to the federal government as were essential to the purposes of the federation, and in accordance with the terms of the Constitution of the United States. The case of Texas is important in this, that in the compact of federation its existence as a sovereign member of the Union was expressly agreed to and guaranteed by the United States, which precludes all question upon the point of state sovereignty as regards that state.

From the above it appears that the American Union is a federation composed of sovereign independent states combining for certain purposes of government, but not combining for others. Being in their nature sovereign, these states can be subject to no political superior, and their conformity with the terms of the Constitution or compact of federation is not the obedience of a subject to his sovereign, but rather an adhesion to the rules regulating the federation which each has in conjunction with the rest, as co-equal colleagues, established for their joint guidance and benefit. Being a co-equal sovereign and not a subject member of such union or federation, a state may secede whenever it chooses to do so, nor is it legally liable for such an act. The American judge, Mr. Justice Iredell, in *Chisholm's Exors. v. Georgia*, 2 Dallas, 433, and seq., says: — "The sovereignty of a nation or state, considered with reference to its association as a body politic, may be absolute and uncontrollable in all respects except the limitations which it chooses to impose upon itself," which are clearly not legal ones. To suppose a sovereign power to be legally liable, is to admit that it can be at once sovereign and subject. The utmost that an act of non-compliance with, or violation of, the rules regulating the union or federation can amount to, is a moral not legal delict by the recusant sovereign state as regards the other sovereign states, and a *casus belli* if they like to view it as such. The federal government, vested with delegated powers only, is subordinate, and has no proper jurisdiction in the matter. The delegate, as represen-



tative of all the principals, has only to exercise those functions with which it is invested by all such principals. When some of the principals quarrel with the rest as to the right of terminating the compact, the delegate being the functionary of both sides cannot properly interfere, for the question relates to a matter not within its functions. The duty of the delegated federal government is to administer the affairs of the federation so long as it continues. The determination of the compact of federation belongs to the parties to it, and certainly the central delegate is not one, it being the offspring of the federal compact. Whether the federation can be dissolved by any number less than the whole of the parties will appear from a consideration of the nature of a federation of sovereign states. The essential characteristic of a federation of sovereign parties is not only the *voluntas* or will of each one to unite for federal purposes with the rest, but to continue in such union. This will to continue, like the will to unite, originates alone with its possessor, and is determinable by it. It is a will which, being a sovereign will, is legally uncontrollable by a superior power, and therefore may be exercised by its possessor arbitrarily. This purely voluntary nature of a federation of sovereign states will in the case of the United States appear more strongly by assuming the federation to be composed, not of sovereign bodies of men, but of sovereign monarchs. Such a supposition is reasonable and legitimate. We will further suppose that each monarch agrees with all the rest that they shall all exercise jointly certain sovereign functions for certain purposes in each of the states, but that for other purposes each monarch shall alone exercise his sovereign functions in his own state. The consequence of this agreement is that there are two sovereign parties in each state—the joint and the single. The joint party may exercise its functions by subordinates or delegates, in like manner as the single. How long is such a compact binding on each of the parties to it? No longer than each chooses. In case of dissent, it is a dissent of sovereign parties and therefore of co-equals; any violation of the com-



pact must be dealt with by international law, and not by the *jus civile*.

Let the following case be put:—A B C D E F and G being respectively sovereign parties to a federal compact, A B and C secede from it. The dispute then rests between themselves and D E F and G, not between themselves and A B C D E F and G, *i.e.*, the union, for that is at an end. It is also clear that any central government being the delegate of A B C D E F and G, that is, of nothing less than all, has no jurisdiction to interfere on behalf of part against the rest. As regards the interpretation of the federal compact, this must in the last resort be reserved to each sovereign, even where by the federal compact the interpretation of it is delegated to certain judicial subordinates for the sake of convenience. No one sovereign, whether king or state, can be unwillingly bound by the interpretation of the rest, otherwise he or it might easily be stripped of all power by the aggrandizements of the delegated federal government. The encroachments of the federal government of the United States upon state rights have latterly been very great, and fully justify the predictions contained in the address of the Minority of the Pennsylvanian Convention, that a government so organized would soon become corrupt and tyrannical, “and absorb the legislative, executive, and judicial powers of the several states, and produce from their ruins one consolidated government, which, from the nature of things, would be iron-handed despotism.” Even that acute statesman, Mr. Madison, who vindicated the necessity of enlarged federal power so ably in many numbers of the *Federalist*, subsequently felt great apprehensions that such power was being unduly aggrandized. It was the main cause of his separation from his literary and political colleague, Mr. Hamilton, and caused him, in his *Letters of Helvidius*, to remark upon “the alarming extent to which constructive prerogative has been carried by the executive and legislative departments.” The same apprehensive spirit manifested itself in the famous Kentucky resolutions of 1799, and the Virginia

resolutions and report on the Alien and Sedition Acts of the same period. The constitutional history of America is full of antagonism of federal power and state rights. Thomas Jefferson's life was one continued, and at last triumphant, struggle in defence of state rights, and his principles now predominate as being more in accordance with the meaning of federation. From the very presidential chair this statesman proclaimed, in 1803, the right of secession. When Napoleon, being First Consul, offered to sell Louisiana to the United States for 30 millions of dollars, an objection was raised in America against the expediency of the purchase, because the Western States had already a considerable tendency to separate from their eastern brethren; and that when reinforced by Louisiana, with New Orleans for a probable capital, they would infallibly, one day or other, separate, and form a new Union. President Jefferson boldly replied that he saw no inconvenience in the separation; that he only looked upon the Atlantic States and the Mississippi ones as elder and younger brethren, who might remain united as long as it was their interest and happiness; and that there could be no objection to their separating as soon as it became their advantage so to do. That he thought this separation probable may be gleaned from his letters in 1820. "I have been," he writes, "amongst the sanguine to believe that our Union would be of long duration. I now doubt it much, and see the event at no great distance; and the direct consequence of this question (Missouri compromise), not by the line which has been so confidently counted on; the laws of nature control this; but by the Potomac, Ohio, and Missouri, or more probably the Mississippi upwards to our northern boundary." Let any one who desires to estimate the intense antagonism between the federal and the states governments read the journals of Congress, in 1790, on the war debts; on the National Bank; the Excise Bills; the Representation Laws in 1791; the Kentucky right of navigating the Mississippi in 1794; the Pennsylvania excise insurrections; the Alien and Sedition Acts of 1800; the anti-war party of

1812 ; the Hartford Convention of 1814 ; the Missouri Compromise of 1821 ; the Georgian disclaimer of 1825 ; the various tariffs of 1828 ; and subsequently the North Carolina disputes of 1834. In short, the history of Congress is filled with threats of secession—threats which could have no meaning except on the assumption of state sovereignty. It is impossible that those states which have not only the sovereign power of making, enforcing, and repealing laws, but also of making, altering, and superseding their constitutions of government, should be considered little better in the federal scale than enlarged counties or parishes ; and to abolish the sovereignty of state rights is, as Mr. George Mason, in his celebrated letter (2 *Amer. Museum*, 534,) foretold, the stepping-stone to a monarchy.

At this place may be stated an objection, whose only force lies in the reputation of its advocates. Mr. Justice Story, in his work on the *Constitution of America* (ss. 352—360), Mr. Dane, Dr. Rush, Mr. Adams, and many other opponents of the right to secede, have supported their views by an attempt to prove that the Constitution is not a federal compact, because it commences thus : “ We, the people of the United States, in order to form a more perfect union, do ordain and establish this Constitution for the United States of America.” They contend that this is an act of the “ whole people of the Union ”—one and indivisible. It is a repetition of the objection against the Declaration of Independence, and simply contrary to fact. The people who ordained were people of states ; the union to be secured was a union of states ; the ratification was a ratification of the states ; and, as such, was an Act of the States so ratifying, and not of the American people viewed as a unit. The fact of some states refusing to ratify till two years after, which, in principle, is as strong as if they had refused for twenty years, disposes of the argument about the Constitution being ordained by the whole people of the Union. That the Constitution is a compact, appears from the fact of the government, being a “ Federal Government ” (see Washington’s letter

to Congress), that is, a government of a federation; and a federation is of necessity the result of a *fædus*, compact or league. All the jurists, from Grotius and Puffendorff downwards, affirm a government of this kind as founded in compact; and one of the first of American jurists, Mr. Wheaton, in his *Elements of International Law*, p. 58, copying Barbeyrac, "Etat Composé," distinctly styles it a "Composite State," which results from a league; and in p. 75, speaks of the bond of union as a "federal compact." The opponents of secession are aware that directly the fact of state sovereignty is proved, and the existence of a federal compact admitted, their case must fail. Another objection taken by them is, that assuming the bond of federation to be a federal compact, yet it cannot be dissolved, except by unanimous consent. This objection is answered, *in limine*, by the fact that the parties are sovereign parties, and therefore legally uncontrollable. Added to this, is the axiom that our ancestors of a hundred or a thousand years ago, cannot bind us or our posterity for all time to come to their political arrangements. If the sovereign people of Virginia chose to join a federation in 1788, their posterity, from similar motives of utility, may choose to secede from it in 1862. The posterity are as much a sovereign power as the ancestors; and the latter can no more bind the former, than the former can bind the latter.

The history of the world affords abundant examples of the right of people of one age to govern themselves as they please, without regard to the opinions or acts of their predecessors or successors. Mr. Madison, in his *Letters of Helvidius*, thus expresses himself on the point: "If there be a principle that ought not to be questioned within the United States, it is, that every nation has a right to abolish an old government, and establish a new one. The French revolutions of 1789, 1830, and 1848; the Carlist wars of Spain; the recent events of Italy and Greece, all confirm the above principle; and our foreign policy of late years has recognised it. The right of dissolving a federal compact by any number

of parties less than the whole, may be better proved by an American example. Two years after the Declaration of Independence, the Independent States entered into Articles of Confederation. These articles, dated the 9th day of July, 1778, commence thus:—"To all to whom these presents shall come. We, the undersigned, delegates of the states affixed to our names, send greeting. Whereas the delegates of the United States of America in Congress assembled, did, on the 15th day of November, in the year of our Lord 1777, and in the second year of the Independence of America, agree to certain articles of confederation and perpetual union between the states of, &c." Then follow the articles, including one (13th), stating that "the Articles of this Confederation shall be inviolably observed by every state, and the Union shall be perpetual." The document concludes thus: "And, whereas it hath pleased the Great Governor of the world to incline the hearts of the legislatures we respectfully represent in Congress, to approve of and to authorize us to ratify the Articles of Confederation and Perpetual Union, Know ye that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and on behalf of our respective constituents fully and entirely ratify and confirm each and every of the Articles of Confederation and Perpetual Union, and all and singular the matters and things therein contained; and we do further solemnly plight and engage the faith of our respective constituents that they shall abide by the determination of the United States in Congress assembled on all questions which, by the said confederation, are submitted to them; and that the articles thereof shall be inviolably observed by the states we respectively represent, and that the Union shall be perpetual." Here it is worthy of note that the ratification was a ratification by states, and not by the "whole people of the Union." Now, if it be contended that federal compacts such as these are inviolable, and perpetually binding on the parties, to them and their successors, by what right was this federal

compact dissolved by them within ten years of its creation? And if it be true, as some (*Fed.* 22) have contended, that the consent of all parties to a federal compact of perpetual union is essential to its dissolution; by what right did nine of the thirteen parties dissolve it in 1788, by establishing a fresh government for themselves under the present Constitution? The plain answer is, By the same sovereign right which enabled each of them to enter into it in 1778.

By the secession of the nine states from the Confederation, the articles became void as to the remaining four states. Had it been contended by one of the four, that the articles still subsisted as between the four, each of the other three might well have pleaded that the articles were void by reason of the purpose or consideration for which they had been entered into, namely, the mutual defence and advancement of thirteen states, having failed, that *that* purpose which thirteen might well achieve, four could not. Here, then, we have an act of secession from a union of states acquiesced in, and not deemed an act of rebellion, nor even a *casus belli*; an act which left the four dissentient states in a condition of sovereign political independence of each other, and of the nine seceders. This is the view taken by one of the framers and advocates of the Constitution, Mr. Madison, who, in No. 43 of the *Federalist*, whilst speaking of the ratification of the convention of nine states being sufficient for the establishment of the Constitution between such states, speaks thus: "Two questions of a very delicate nature present themselves on this occasion. First, on what principle the Confederation, which stands in the solemn form of a 'compact among the states,' can be superseded without the unanimous consent of the parties to it. Secondly, what relation is to subsist between the nine or more states ratifying the Constitution, and the remaining few who do not become parties to it?"

The first question he answers in two ways: first, "by recurring to the absolute necessity of the case, to the great principle of self-preservation; to the transcendent law of

nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed." Secondly, by pleading breach of compact. "A compact," says he, "between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties that all the articles are mutually conditions of each other; that a breach committed by either of the parties absolves the others, and authorizes them, if they please, to pronounce the compact violated and void."\* The second question he answers by distinctly affirming that "no political relation can subsist between the assenting and dissenting states." By this expression "political relation," he means, a political relation of a federal character. Now, if the above arguments of Mr. Madison are valid, as against the Articles of Confederation, what is the essential difference which prevents their application to the Constitution? The sovereignty of the states is indisputable; the Constitution was ratified, like the Articles of Confederation, by the states (whether by the delegates of the people of the state, or by the states' legislature, is immaterial, the ratification was a sovereign act of the state), and not by the "whole people of the Union," viewed as an indivisible nation, the ratification being not a single act, but many acts, extending over considerable periods of time; there was a central delegated government in both cases, which, under the Articles of Confederation, extended to individuals as well as states; and though not so extensively as under the Constitution, still sufficient to prevent all question of its existence; besides, the law reports of the period afford abundant examples in proof; the composite nature of the federal nationality also was as strongly marked under the articles as under the Constitution, the federation being in both cases a federation of

\* Si para una fedus violaverit, poterit altera a federe discedere, nam capita federis singula conditionis vim habent.—*Grotius, B. & P. 2, 15, 15.*



states. There is no essential difference between the two which would prevent the application of Mr. Madison's argument to the case of the Constitution.

The proposition that sovereign power is incapable of legal limitation has been briefly dealt with in the course of these remarks; but a further and more extended proof of it will, perhaps, be not altogether superfluous, as it is the standard whereby the Southern right of secession, and the Northern right of coercion, must be judged, if judged according to the principles of jurisprudence.

The sovereign power of a state (*summum imperium*) may be placed in one person as in a monarchy, or in a select number (oligarchy), or in the body of the people, as in the various states of the American Union. Puffendorff (De J. N. and G. l. 7. c. 5), says: "Summum imperium, prout vel in uno homine vel in uno concilio ex paucis aut universis constante reperitur, diversas formas rerumpublicarum producere solet." The individual or body of individuals possessed of this sovereign power, is properly sovereign; and though in the states of America the exercise of the sovereign power, both federal and state, is by delegates or subordinates; yet the power must always be deemed as residing in the first degree in the principals who delegate and authorise, i.e., in the people. Directly we place the sovereign power in the people, we see the legal irresponsibility of the sovereign with greater distinctness than when that power is placed in one person. The following definition then holds true as regards the American states: "Habet hoc omne imperium, quo universa aliqua civitas regitur in qualibet reipublicæ forma; ut sit summum, i.e., in sui exercitio a nullo homine tanquam superiore dependens, sed ex proprio judicio et arbitrio sese exserens, sic ut ejusdem actus a nemine tanquam superiori queant irriti reddi." (Puffendorff, De J. N. & G. l. 7. c. 6.; Grot. B. & P. l. 1. c. 3.)

In discussing this question, the fact of the body of the people of the different states being the owners of the sovereign power, and for convenience' sake exercising it by deputy,



must be steadily kept in view. Every law properly so called implies three essentials. First, there is the sovereign who enforces the law; second, the subject who is to obey it; and thirdly, the law or command itself. Now, to suppose this sovereign subject to a law is to suppose him subject to that sovereign power who enforces the law, that is, to suppose a sovereign subject to a sovereign, which is a contradiction. To assert that the sovereign power is legally restrained implies the existence of a second party in whom the power of legally restraining such sovereign is vested; such party must then be the real sovereign over the other. But the like assertion of legal restraint may be made against the second party's sovereignty, and then we must suppose the existence of a third party's sovereignty restraining the second, and so on *ad infinitum*. The maxim of the English law, that "the king can do no wrong," that is, legal wrong, is perfectly true, and founded on the soundest principles of jurisprudence; the only objection to the maxim being its irregular expression, the term "king" being incorrect or inexact, the correct and exact term being "sovereign." The sovereign power of Great Britain is vested in the three estates of the realm, king, lords, and commons; the three combined are "the sovereign," and not any one or two of them. In common parlance the king or queen is styled "the sovereign," but it is legally incorrect, all that it really means is that he or she is a member of the sovereign body, not that he or she is sole sovereign, which is political heresy. That "the sovereign" properly so called can do no legal wrong will be proved by the following example. In the Articles, and the Act of Union between England and Scotland, provision is made for the preservation in both countries of their respective Church and Kirk establishments. Now a parliamentary abolition of both these establishments would be probably an unrighteous, but most certainly not an illegal act; it would have been done in due course of law by "the sovereign." So again, the Act of Parliament which determines that the executive of these realms shall be of the Protestant faith

may be repealed by the same "sovereign" power which brought it into existence; there can be no illegality about such repeal, though there may be much moral wrong. In both of the above cases the acts, although not illegal, would certainly be morally wrongful. The best though not unexceptionable designation of such acts is, that they are unconstitutional. The improper suspension of the *Habeas Corpeas* Act, or the passing of the *ex post facto* statutes, called bills of attainder, may be done in due form of law, and therefore legal, but nevertheless the same would be unconstitutional. The remedy for an unconstitutional act rests with the body of the people, who may justifiably censure and resist. If the party exercising the sovereign power has deceived them in the matter, they must deal with that party in the best way they can, and which common sense points out, remembering that if they have the moral end of the staff, he has generally the physical. In the case of America, it would be a dispute between the people of the state, and those to whom they delegated the sovereign power. A constitutional act may be defined as an act of the sovereign, which is in accordance with the general mode of government approved by the nation, or in accordance with those maxims of government received and adopted by the nation. These maxims when put into writing are termed written constitutions. Each state of America has its written constitution in addition to the federal one. None of these comprise the whole of the constitutional principles of American government. The unwritten ones are those maxims which their ancestors brought from England with the English laws. Now, from what has been said, it appears that the states of the American Union, being sovereign states, cannot be legally bound; that as they are not legally bound to the Union, their secession from it is not an illegal act, and that the Federal Government, in attempting to adjudicate upon the right of dissolving the federal compact by the respective parties to it, is clearly going beyond its delegated powers, and acting *ultra vires*. That being so. by what

right can their equals, the Northern states, deny the Southern states the exercise of their rights of sovereignty ; nay, further, assert that the act of secession is a legal crime, upon which the Northern, or non-seceding states, have alone a right to decide ? Suppose that all the states of the Union, except Rhode Island, Connecticut, and New Jersey, had seceded from the Union, would the congress under such a state of things be such a congress of the Union as to justify these three small states in declaring all the other states not only rebels, but their property subject to confiscation ? Would such an act be an act of the congress of the Union ? Certainly not. The principle of the right of declaring people rebels, and confiscating their possessions, must hold good as well in three states as in thirty, although the power of executing it be wanting. It is, however, untrue. The only correct way of dealing with the seceding states by the non-seceding ones is to deal with them as enemies upon a just *casus belli*. If the non-seceding states succeed in overcoming the seceding states, they must stand towards each other as victorious and vanquished sovereigns, and be guided by the rules of war prevalent among the most civilized nations. State trials have no legitimate place in this quarrel.

The inhabitants of seceded states can be no rebels to the federal government by reason of such secession. A sovereign state as member of a federal union of sovereign states cannot, by reason of its sovereign and corporate character, commit treason against the United Government, yet the individual citizens of such sovereign state may do so. For though the citizens may as a body possess, in the first instance, supreme sovereign power, and so far be a sovereign body, as above shown, yet each of them individually may be and is a subject, not a sovereign member of such sovereign body, and is, therefore, amenable to the laws. Each sovereign state, by entering into the compact of union with the other sovereign states, bound its own subjects thereby ; and such subjects, in addition to the allegiance they were bound to render to their own sove-

reign state, were also bound to render a like allegiance to the sovereign union of which their own state was a sovereign member. The third article of the constitution points to treason committed against the federation by individuals. Treason may also be committed against any particular state and not against the federation, as laid down in *People of New York v. Lynch*, 11 John Rep., and such treason is properly cognizable only by the judicature of such state, a convincing proof of state sovereignty. But few cases can arise which, being treason against a particular state, cannot by implication be made cases of treason against the federation. Hence the tendency of the Supreme Court of the United States to aggrandize to itself a jurisdiction greater than what fairly pertains to it, and which caused Thomas Jefferson to style the judiciary as the stronghold of federalism. The liability of the citizen of a sovereign state to the laws of that state continues during his allegiance to that state, but the liability of such citizen to the laws of such federation continues only so long as his sovereign state (he being its subject) continues a member of the federation. Directly such sovereign state secedes from the federation its subjects must secede with it, and by such secession they lose all the rights and are free from all the duties which subjection to the laws of the federation entails upon them. They become aliens to the rest of the federation, and though by reason of such secession the relations between themselves and the rest of the federation states and subjects may become very complicated and difficult of solution, the result must be accepted, such as it is, as the result of an act of a sovereign power.

Some American jurists, ignoring the doctrine of state sovereignty, have contended that the states cannot legally secede, and, therefore, their acts of secession cannot be viewed as such, but simply as attempts to do that which they cannot legally do. The fact of secession, exemplified by the withdrawal of representatives from congress, cannot be legally ignored, but must be taken in all its integrity. The law

recognises the difference between an inchoate and a completed act. In martial law he who attempts to desert, but is captured whilst scaling the barrack walls, is not actually a deserter, but he who gets clear off is. So in the criminal law, he who attempts to murder a man is not *in pari passu* with him who actually completes the attempt. The last is a murderer, the first is not. So the fact of secession must be judged according to its nature, and decided to be a perfect, not an inchoate act. And then, in case the North prevails, will arise the question of state rights and legal jurisdiction; and the tribunal deciding it will be a tribunal not of all the states of the Union, but only of those which have not seceded, sitting in judgment upon the members of those which have: a case not provided for by the constitution nor really within it. (*Fed. 43.*)

Assuming the Union to be a federation of sovereign states founded in compact, as it really is, the question arises, how long is any one state bound to continue a member of the federation? The short answer is, only so long as it pleases and no longer. Directly it ceases to derive from the federation those benefits the attainment of which was the object of its joining the federation, then the law of self-preservation and necessity of the case demand that it should, as to itself and the rest, dissolve the compact, as shown in the secession in 1788 from the federation of 1777. The other members of the Union may suffer by such secession, but states are subject to the same natural law which governs individuals, and which justifies the seceding state in saying: "I am not bound to sink that you may swim." And is the seceding state alone to be the judge of the expediency of its secession? Yes, for as the expediency of seceding is founded on a law which transcends all civil laws, namely, the law of nature, and as under that law neither the non-seceding states nor any other power are appointed arbiters in the matter, the right of deciding rests alone with the suffering party. The British race has proved the truth of this argument by many examples

to be found in its history, and not the least notable and pertinent one is afforded by the Declaration of Independence made by certain British colonists in 1775, with which the Americans are probably well acquainted. The connexion of these colonists with the mother country was incompatible with their interests; and they alone decided that the connexion should cease.

The American federation is *sui generis*, and resembles nothing of the kind in ancient or modern times. It is not perfect as a scheme of federal government, but it may fairly claim to be, in its main features, the best possible of its kind. Being a federation, it has all the defects and all the advantages peculiar to that system of government. The bond is only voluntary, so far exposed to dissolution. On the other hand there is the benefit of combination, and, in the event of dissent, the benefit of separation—advantages which are very great. Secession, as far as it goes, is the natural termination of a federation, but to attempt to maintain that federation upon grounds antagonistic to its nature, that is, by force, is to destroy it. The defenders are sapping their own fortress. The great necessary and all-powerful bond of federation is hearty goodwill and co-operation. If these be wanting, the federation exists but in name, it is actually gone. No State trials, no military subjugations, can renew it. The conquered may be bodily coerced, but their minds will be free. The compulsory union binds the willing conqueror as well as the unwilling conquered. It is a union without unity. Whatever they do must lack the vigour arising from combined energies and resolves, and be profitless to them except perhaps as a moral. Far better would it be for the North to admit the principle of secession and to let the South go, especially as there remains to the North an extent of territory and resources which must, in the natural course of things, soon place her above the South, and always keep her in the front rank of nations. Prudence demands that each should part in peace, trusting to a better time and a better spirit for the renewal of that

bond which, had they both been wise, would never have been broken. Let the North remember that "it is," as Owen Felltham says, "much safer to reconcile an enemy than to conquer him. Victory deprives him of his power, but reconciliation of his will: and there is less danger in the will, which will not hurt, than in the power which cannot, for the power is not so apt to tempt the will as the will is studious to find out the means." \*

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## ART. V.—CRIMINAL PROCEDURE.—PUBLIC PROSECUTORS.

1. *The Eighth Report of the Commissioners on Criminal Law.*
2. *A Bill to provide for the Appointment of Public Prosecutors, and for the Amendment of Criminal Procedure in England and Wales.*
3. *The Report from the Select Committee on Public Prosecutors.* Ordered by the House to be printed, 9th August, 1855.
4. *Judicial Statistics, 1861. England and Wales. Part 1. Police. Criminal Proceedings. Prisons.*

IT is obviously of the utmost importance to the well-being of a state, that its system of administering criminal justice should be rendered as efficient and exact as possible. We therefore offer no apology for drawing attention from time to time in these pages to some of the grave defects which are still allowed to disfigure our criminal procedure, and which the exercise of a little simple but judicious legislation would at once remove. How that legislation should be applied, in one important instance, we shall indicate in this article.

The repression of crime, which forms the proper province of criminal jurisprudence, is effected by two agencies:—First, the detection and defeat of attempts to commit offences;

\* We must not be understood as necessarily concurring in all the opinions expressed by our able contributor.—ED. L. M. & R.

second, the discovery of those who have committed offences, and the application of a deterring punishment. The first is the detective and preventive; the second, the detective and deterring department. The first agency is exclusively that of our police system; the second is partly that of our police, and partly that of our executive. It is with the second that we are about to deal. And our concern will be chiefly with the stages which precede the trial at the sessions or assizes.

When a crime has been committed in this country, the fact is at once brought under the notice of the police authorities. An officer is instructed to take the case; and he institutes an inquiry, which enables him to carry some suspected person before the justices in petty sessions. If upon examination the facts are strong enough to cast grave suspicion upon the accused, he is committed either to the sessions or the assizes. Here then, we have the first two stages of a criminal process: the first stage, between the offence and the apprehension of the supposed offender; the second, between the apprehension and committal. In the first stage, the offices of inquiry, of warning, of pursuit and apprehension, are very properly placed in the hands of the police; and in ordinary cases this duty is done with much energy, skill, and intelligence.

As soon, however, as the supposed offender is taken, the whole aspect of the case is changed. If the crime be one of such magnitude as to take it out of the summary jurisdiction of the justices, the conduct of the case always requires some care, and often requires some experience of law. Fortunately this care and experience are in some measure supplied by an officer who is a necessary part of every petty sessional court. This officer is the clerk to the magistrates. The clerk to the magistrates is almost always an attorney of standing and experience. It is his duty to attend the Court whenever it is sitting; to arrange the order of business; to take down the depositions of the complainant and his witnesses, in each case; to read over these depositions to the deponents; and, in a word, to conduct all the purely ministerial work of the Court.



Often the professional knowledge and experience of the magistrates' clerk render him a valuable adviser, both on points of law and practice. Indeed, as a general rule, the magistrates' clerk does, to some extent, conduct each case on behalf of the Crown—sifting the evidence as it is given; checking the police officers; pointing out to them defects in the case; suggesting the manner in which such defects should be supplied; and, in most instances, advising the Bench on the ultimate questions of dismissal, remand, or committal. It must, however, be remembered, that though this is, in fact, the position taken by the clerk to the magistrates, and though, indeed, it is a position which he must almost of necessity assume, these functions of *quasi* prosecutor are not within the scope of his proper office, and are not legally recognised. Nor, in those sessional divisions where the criminal business is large, is it possible that the clerk can, under the existing arrangement, exercise more than the most cursory supervision over the cases as they come pouring in. This is all that the present scope of his duties requires of him. On this basis his salary and staff are fixed. It would therefore be unreasonable to expect that he will give close attention to the more serious or intricate charges, which present difficulties in law or fact.

The next stage is the interval between the commitment and the presentment to the grand jury. After committal, the officer to whom the warrant was first handed, or who first apprehended the accused, still retains charge of the case. As a rule, it goes to the sessions or assizes, just in the same state in which it was presented to the examining magistrates. The practice is for the clerk to the magistrates to hand copies of the depositions (not unfrequently through the police officer) to an attorney, who takes the fees allowed by the Treasury for prosecutions. These fees are very small: so small that they would not repay a respectable attorney in moderate practice for giving any proper attention to the prosecutions, even if he got them in large numbers. It follows, that

wherever these prosecutions are open—as is mostly the case—\* they are sought after, and conducted by attorneys of a low class, who seldom do more than place a copy of the depositions in the hands of counsel.† In the meantime, the original depositions are forwarded to the clerk of indictments for the Court to which it goes. He prepares the indictment.‡ The accuser and his witnesses are brought by the police-officer who superintends the case, to the sessions or assizes. There the indictment is handed to the prosecuting attorney, who has arrived with his brief, which, as we have before remarked, is merely a copy of the depositions. At sessions, the depositions are not often preceded by any statement of the case; but at assizes they always are. This statement, in most cases, is nothing more than another copy of the depositions put into the third, instead of the first person. Of course, the police officer, if he be intelligent and active, has mastered the details of the charge; and, between the commitment and trial, has looked after it. Sometimes an additional link of evidence is wanting; he supplies it—sometimes there is ambiguity in the evidence already obtained; he clears it up. But every effort of his has been made under the bias of natural zeal for a conviction. The results of these inquiries are supplied to the prosecuting attorney, and put into the brief. When the prosecuting attorney meets the prosecuting policeman with the witnesses on the morning of the assizes, he hands him the indictment, and there generally, in the present state of things, his duty ends, so far as the prosecution goes.

The policeman then undertakes the conduct of the case through its next stage, which is the presentment of the charge to the grand jury. He collects and marshals the witnesses, takes them into the grand jury room, and the bill is presented

\* At Liverpool and Manchester the prosecutions are managed by attorneys appointed by the Town Clerk, at a fixed salary. At Leeds, by a kind of compromise, the cases are handed to three attorneys, who act as joint prosecutors, and divide the fees.

† *Report on Public Prosecutors.* Richardson, QQ. 872, 873; Hemp, 883—886; Goodman, 2,219—2,224.

‡ In serious or difficult cases it is drawn by counsel.

to the foreman, who also has the depositions before him. The grand jury have no professional assistance. At sessions they are generally respectable merchants and tradesmen; at assizes, they are composed of the leading gentry in the county. It need scarcely be added, that the grand jurymen at sessions are ignorant of even the rudimentary principles of criminal jurisprudence. At assizes, its members are mostly men of education, and have often had some experience in the practical administration of the criminal law.

Before the grand jury an inquiry takes place, which, to some extent, resembles that made before the examining magistrates. It is, however, much less close, searching and accurate, being conducted privately, and without the assistance of a clerk,\* who is always present at petty sessions. It follows, naturally, that the investigation is usually of the most imperfect kind. With the grand jury, however, rests the absolute and uncontrolled discretion of deciding whether the charge should be sent before the Court. If they decide that it should, and bring in a true bill, we reach the last stage. The prisoner is arraigned or put upon his trial.

Now, the object of putting a man upon his trial is to ascertain whether or no he has committed a crime alleged against him. But, inasmuch as it is a matter of grave moment to the individual, that such suspicion should rest upon him as requires a trial; and as it is of still graver moment that such suspicion should not be allowed to remain upon his character without just cause, we find two principles resting at the very foundation of true criminal justice. First, that suspicion

\* Mr. Markland, one of the attorneys employed at that time to conduct the prosecutions at Leeds, says, in his evidence before the Select Committee on Prosecutions, that he "had been frequently called in before the grand jury to explain."—(Q. 802.) We believe, however, that this is most unusual, and we question whether the present constitution of the grand jury allows of such interference. In the Eighth Report of the Commissioners on Criminal Law, it is expressly stated that the prosecutor only "may attend the grand jury to assist in conducting the evidence on the part of the Crown." (Art. lxix.) The only exception seems to be that of allowing counsels' attendance in charges of high treason.—12 Viner's Abridgt. 38; Hawkins' Pleas of the Crown, 62, c. 46, s. 93. Corner's Practice, 723.

of a crime shall not be attached to any one without good reason; and, secondly, that when once suspicion has been publicly attached, the charge should be carefully sifted, with rigorous impartiality. These two great principles have now become clearly recognised in our criminal code; but in our system of criminal procedure, we find them constantly opposed to and in antagonism with the well-known rule, that "certainty of punishment is the greatest preventive of crime."

From this opposition and antagonism, a double evil arises in the following way: The prosecuting officer at present is the police officer. He knows that his promotion depends upon his showing energy, skill, and intelligence in the detection of crime. He, of course, instinctively acts upon the rule. On the other hand, the magistrates and their ministerial officer are bound to act upon the two great principles; and if this counter action were properly directed and controlled, nothing could be more salutary. Unfortunately, the correlation of the rule and the principles is not perfect. There is an intermediate controlling force wanting. The policeman—or present prosecuting officer—may be clever, diligent, earnest, persevering; but his very position robs him of one essential quality for this post. He can never be unbiassed; he must be a partizan. His great object is and always must be, to find an author for every crime. Were he under the control of some one whose position raised him above the temptations which he finds irresistible, all this assiduity and strong personal interest in the pursuit of criminals and their detection would be invaluable. But this control is wanting; and the consequence is, that in the year ending December 31, 1861, 8,794, or 32·4 per cent. of the 27,174 persons who were apprehended on suspicion of having committed indictable offences, were discharged upon examination before the magistrates.\* Nearly one person out of every three taken into custody left the police court innocent in the eye of the law of the crime laid to his charge. Many probably of those discharged are,

\* Judicial Statistics, 1861, table 3, p. 12.

in fact, guilty. If so, a skilful, educated, and intelligent attorney dealing with the case as it arose, would have placed it before the Bench in such a light that there would, probably, have been a committal instead of a discharge. It is equally certain, that many of those discharged were innocent; and a similar supervision would have saved these innocent men and women from the pain, the exposure, and the infamy of a public criminal examination.

It is plain, therefore, that there is here an important defect in the machinery of our criminal procedure. Some official is wanting, to whom the injured shall be able to come as of right for advice; to whom the police officer shall come for instruction and direction in all cases of emergency or difficulty; to whom, not merely as *amicus curiæ*, but as an assistant, responsible for the proper management of each case, the justices may always turn for information; and, lastly, to whom the innocent accused may submit the *indicia* of his innocence, with the confidence that they will be carefully, conscientiously, and impartially examined. This officer—wanting only in our scheme—present, in some form or another, in every other civilized state, is the Public Prosecutor.

Yet, no system of criminal jurisprudence, no political or social conditions exist, in any other state, which are so well adapted for such an officer. We have a public preliminary examination: the whole proceedings, from the time at which the accused is charged to his trial, are before the world: we have a press, which records, with only too scrupulous fidelity, what occurs in our criminal courts: the principles of our criminal code are broad, sound, and humane; and our constitutional privileges are so firmly established, that we have no need to fear any political danger from the creation of a Crown office for the pursuit of crime. Conservative prejudice alone has hitherto opposed the arguments which thoughtful and practical lawyers have long been using in favour of the change. Those arguments began to attract notice when Bentham propounded his scheme for Govern-

ment Prosecutions; in which he made the Government a party in all penal cases, and created a Public Prosecutor, under the name of "Immediate Government Advocate."\* Beneath the quaint and pedantic language of this profound jurisconsult, indeed, lies the form of a perfect system of Public Prosecution; and the principle may be clearly traced in the plan we are about to put forward. From that time onwards to the present day, there has been constant agitation and discussion upon the subject. It was brought forward in the circular questions of the Commission on Criminal Law. The circular was sent to all the justices' clerks in England and Wales, and to a large number of men whose experience in all departments of criminal practice qualified them to form a sound opinion as to the suggested reforms. The answers sent in reply to the circulars are printed in Appendix A to the Eighth Report of the Commission. Amongst them are an exhaustive and able letter from the Committee of the Society of Justices' Clerks; and Mr. John Pitt Taylor's admirable article on criminal procedure, which was written in answer to the circular, and was originally published in the *LAW MAGAZINE*. This inquiry produced an agitation which at last compelled the attention of the Legislature. And, in the year 1855, Mr. Phillimore brought forward a Bill for the appointment of Public Prosecutors. Against this measure many practical objections were raised. It was, however, referred to a Select Committee, composed of men more than commonly fitted to deal with the question. Amongst its members were the present Chief Justice, Lord Chelmsford, Sir George Grey, the then Lord Advocate (Right Hon. James Moncrieff), the then Solicitor-General for Ireland, and the Rt. Hon. Joseph Napier. Its report, and the evidence on which that report was founded, were presented the same year. During its session, witnesses drawn from all ranks of the profession—witnesses carefully selected for their varied experience in criminal practice—were examined. Amongst these witnesses

\* "Constitutional Code," Works, vol. 9, p. 23.

was an ex-Chancellor,\* who for close upon half a century had wrought with ceaseless and successful energy in the field of law reform, who, as far back as the year 1833, had fully expressed his views upon the subject before another Committee of the House, and who now repeated these views with great force and distinctness. Another of the witnesses was the Lord Advocate of Scotland, who, holding the position of Minister of Criminal Justice for that part of the State, was able to place before the Committee a complete and lucid account of the system of Public Prosecution, which had for many centuries obtained in Scotland. The then Chief and the present Chief Justice of all England (at that time Attorney-General), also laid before the Committee their views upon the question. And it may here be observed that the statement of the last-named judge, is a model of such evidence; clear, concise, luminous, and moderate, it explained the existing system in all its details; it showed its defects; it pointed out the remedy for each defect, and at the same time pointed out the practical difficulties which would have to be dealt with in adopting each remedy. Again, another witness who was examined had been Attorney-General for Ireland, and being a man of great ability, had mastered the system there used. He was, therefore, able to explain it very clearly. Moreover, there were consulted and questioned by the Committee, the Recorders of London and Leeds; the Clerks of the Peace for York and Leeds; the Clerk of Arraignment to the Central Criminal Court; the Under-Secretary of State for the Home Department; the Solicitor to the Treasury, who conducts all the State prosecutions; the clerk to the magistrates for Leeds; the attorneys appointed to conduct prosecutions at Liverpool, Manchester, and Leeds; several officers appointed to examine and tax the costs of prosecutions on behalf of the Treasury; and many others who as attorneys, barristers, or otherwise, had been so

\* Lord Brougham.

placed as to gain a practical knowledge of some branch of our criminal procedure.

In this large body of evidence there are of course differences of opinion as to details, but upon two points all the witnesses were agreed. They all agreed that the present system was very defective, and that it is capable of great improvement. We will briefly state the grounds upon which the witnesses founded these conclusions. We will then point out the defects which rendered the measure proposed by Mr. Phillimore impracticable; and we will, lastly, offer a scheme which we think would prove equally simple and efficient. It is necessary, however, that we should keep clearly before us the general proposition that "it is the duty of the State to detect crime, apprehend offenders, and punish them, and that independently of the interest of a private party."\* This proposition in itself contains all the objections to the existing system, which were pointed out in detail by the witnesses.

It is a great principle of criminal jurisprudence which has been adopted in every civilized state except our own. Here alone there is no officer of justice to whom "the poorest man may come and desire him to conduct his case when an offence has been committed against him."† The injured person may, to use Lord Denman's words, be "helpless, ignorant, interested, corrupt."‡ Yet he, and he only, can take action. The injury done to him may be, and in most cases is, an injury done to the whole society of which he is a member. Yet upon him is entailed the duty of originating and directing a prosecution. "It may be said," to quote the words of another witness,§ "that a person injured knows perfectly well, practically speaking, that if he goes before a magistrate, and says he has a charge to make against a particular individual, the

\* Evidence of Advocate General, Q. 111.

† Chairman of the Committee, Evidence, Q. 2,400.

‡ Answers to Questions of Commission on Criminal Law. Eighth Report, Appendix AA.

§ Evidence of Sir A. Cockburn, Q. 240.



magistrate will grant a summons or a warrant, as the case may be." But as he justly adds, "where the shoe pinches is this: that in such a case there may be a very good case for a conviction, supposing you have all the evidence necessary. But this man has not the means for getting it together, nor sufficient information as to the precise nature of the evidence which will constitute legal proof of the offence. And, therefore, though an offence has really been committed, and he has sustained an injury thereby, and the party offending ought to be brought to justice, he is brought to trial, but is not brought to justice. He is acquitted where he should be convicted."\*

Again, to adopt the dictum of Lord Denman upon the general proposition, this private prosecutor "is entirely irresponsible; yet his dealing with the criminal may effectually defeat justice. He may be interested, he may be corrupt, but the State can exercise no control over him." It can be no matter for wonder then, that we find the witnesses successively pointing out a series of evils in our criminal administration, which are caused by this radical defect in the preliminary examination. Failure of justice, it was said, constantly occurs through the absence of some competent officer, during the first stage of the inquiry; first, by the apprehension of persons upon suspicion so slight as not to justify any public examination at all; secondly, by the escape of offenders for want of efficient and skilful conduct in making such examination. The chief advantages of a public prosecutor at this stage would thus be, that suspicion would be prevented from falling publicly upon the innocent, and that at the same time greater security would be afforded against the escape of the really guilty. We need not urge the grave importance of these two safeguards. Yet, at the very first step which converts the citizen into a criminal, which brings him before the public with the ineffaceable stain of a criminal accusation fixed upon his character, we find no attention given to either of these objects. The charge may be most frivolous and unfounded, yet it may be at once

\* Evidence of Sir A. Cockburn, Q. 240.

publicly preferred. The crime may have been committed with practised dexterity and the most subtle forethought, such as only the ablest and most experienced practical lawyer can deal with, yet it is allowed to be handled by a bungling police officer. Therefore it is we find, as we have already stated, that 32·4 per cent. of the persons apprehended in 1861 were discharged upon examination before justices, and that 4,423 were acquitted upon trial.\* But the tables reveal another fact of a very startling nature. It appears that of the twenty-seven thousand and odd persons apprehended in 1861, no less than 5,404 were of previous good character, and 6,796 were of "character unknown," that is, against whom no previous evil conduct was known.† The tables do not distribute into classes the persons discharged or ultimately acquitted. We only know that a large proportion of those apprehended bore previous good characters; that a still larger proportion bore characters which were not proved to have been before stained by crime; and that the number of those, sooner or later discharged, was a trifle larger than the numbers ranged under these two classes. Judged by the just standard of our criminal law, nearly one-half of those arrested were innocent of the offences imputed to them. Very little less than one-half had not been suspected or known to have ever committed a criminal act. Yet these men and women had been taken into custody; had been taken before magistrates; had been imprisoned, in many instances for long terms; had suffered the misery of separation from their families and homes; had suffered serious loss in their business; and when released even at the door of the magistrate's court, had come back to their homes, their shops, or their daily duties, with the miserable shadow of suspicion upon their lives.

There can be little doubt that a large proportion of those thus discharged or acquitted were morally as well as legally innocent. There can be as little doubt, if we are to

\* Judicial Statistics for 1860, table, p. 45.

† 5,759 were "known thieves."

believe the unanimous statements of the witnesses examined before the Select Committee, that most of these innocent persons would have been saved the humiliation and the expense of a public examination if only the charges had been previously and carefully looked into by an experienced, intelligent, and conscientious Crown officer. Of course, the balance of these persons, discharged or acquitted, who were not really innocent were guilty. Every witness concurred in thinking that the superintendence of these cases before commitment by such an officer would, at all events, have ensured the trial of the charge before a jury.

And in the second stage, between commitment and presentment, we find emphatic stress laid upon the utility of a public prosecutor. "Does your Lordship," asks the Attorney-General of Lord Brougham, "does your Lordship think that our present system is defective in this respect: that there is no one to see that the evidence is complete, so as to ensure conviction, where a conviction ought to take place between the time of commitment and the time when the bill is found and the trial takes place?" "That, no doubt," replies the venerable ex-Chancellor, "is a grave defect."\* "Has it never happened to your Lordship to see a criminal case very ill got up for want of sufficient evidence being brought to convict the prisoner?" "Yes, very often." "Would not a public prosecutor prevent that?" "Most undoubtedly; and, therefore, I wish to have a public prosecutor." Such were the opinions of the late Lord Campbell.† "I think," says the present Lord Chief Justice, "I think it very often happens that cases are brought to trial which are only imperfectly got up, and that they break down from the want of some superintending and controlling power to get the evidence together, and see that it is complete."‡

So, too, it was shown that the want of a proper person

\* Evidence of Lord Brougham, Q. 58.

† Evidence, QQ. 694, 695.

‡ Evidence, Q. 2,394.

specially charged with the conduct of prosecutions renders their management at the trial very imperfect. For here the "superintending and controlling power" is equally needed to watch the case, to marshal the evidence, to direct the police officer, to instruct the counsel.

Nor were the moral benefits which would result from such a change less strongly insisted upon. It was urged that the administration of criminal justice would thus be rendered more uniform and equitable, at the same time that it would be far more perfect and economical. It would give to a calm, unbiassed, and responsible officer a discretion now unfortunately placed in the most improper hands. It would afford a safeguard against collusion, against private malice, against unjust compromises. It would ensure the pursuit, detection, and punishment of crime, whether in high or low places. It would raise the poor and the weak above the reach of wealthy oppression, brutality, or false accusation. It would place all classes as much on an equality as is possible in the existing state of society. It would give the innocent a fair opportunity for proving their innocence. It would make a stumbling-block for the feet of the wicked.

But whilst all the witnesses concurred in approving of the principle of Crown prosecutions, all saw great practical objections to the scheme embodied by Mr. Phillimore in his Bill. That Bill proposed to divide the counties into districts,\* and to appoint one or more barristers,† of not less than ten years' standing, at a salary of not more than £1,500 a year, to conduct, under the title of "Public Prosecutors," all the criminal prosecutions in each of these districts. Subordinate to these officers, the Bill provided "Assistant Public Prosecutors:"‡ —five for Middlesex and Westminster; one for every other county, or sessional division of a county; one for every two counties in Wales; and one for every such borough as might be fixed. The salary of each of this tribe was to be not more than £300 a year.

\* S. 1.

† S. 2.

‡ S. 3.

Thirdly, the Bill proposed to give what was termed a "district agent" to any county, division, riding, or borough, as might be thought fit. This officer was to be an attorney of not less than seven, or a barrister of not less than five years' standing.

And, lastly, each petty sessional division was to have an attorney of not less than three years' standing. The salaries of the two last-mentioned officials were not fixed.

The remedy wanted was a simple one. Here was machinery of the most complex kind, most difficult to organize, and a source of vast additional expense; worse still, it was not needed. Those who have dealt much with ordinary criminal business know how simple and clear the great average of petty criminal cases are. With most, even of the graver cases, all that is required is some knowledge of the principles of criminal law, activity, vigilance, and conscientiousness. During the year 1861, 50,809 indictable offences were committed in England and Wales;\* but of these, only 2,473, or less than one-twentieth, were offences against the person, which rank first in gravity. There were only 5,062 offences against property, with violence, which rank second. The third class, namely, offences against property, without violence, includes larceny, embezzlement, and fraudulent obtaining, or receiving. These are clearly the mildest forms of crime; their number was 40,242, or almost exactly four-fifths of all the indictable crimes committed. Doubtless, some of these offences were of magnitude and importance. Many of them involved nice questions of law; all of them required careful superintendence by an alert and energetic officer. But there were few of these cases which an experienced magistrate's clerk of average intelligence could not have dealt with effectually if his attention had been fairly given to them.

If we take a smaller area in detail, this fact will be readily proved. The West Riding of the county of York is divided into ten police districts, namely:—the County, the boroughs

\* Judicial Statistics, Part I., table 5.

of Bradford, Doncaster, Halifax, Leeds, Pontefract, Ripon, Sheffield, and Wakefield, and the town of Huddersfield. In these ten police districts 2,501 indictable crimes were committed during the year ending the 29th September, 1861.\* The county district, of course, has the largest number of crimes (846). Next comes Leeds, which had 626; then Sheffield, 400; Bradford, 337; Wakefield, 122; Halifax and Huddersfield, 54 each; Doncaster, 34; Pontefract, 23; and Ripon, only 5. Each of these districts is well able to manage its crime without a permanent standing counsel; for such, in fact, would have been the official provided by Mr. Phillimore, under the name of "Public Prosecutor." Two or three cases in a year at a place like Leeds or Sheffield, and a case now and then in the county district, present difficulties in law which make the opinion of a leading criminal barrister very desirable. But this opinion can be readily obtained from London, and is sure to be as good as if it were obtained from some counsel resident in the district. If no nearer approach were made to the formation of a Ministry of Justice than the appointment of standing criminal counsel, as assistants to the Attorney-General, to whom all cases of intricacy or difficulty should be referred from the country, every object would be attained that could have been attained by the appointment of Mr. Phillimore's army of "Public Prosecutors," each with a salary of £1,500 a year.

The same objection applies to the "district agent," who would be equally unnecessary. All that is wanted is, some person properly qualified by a legal education, and attached officially to each petty sessional court; whose duty it would be to attend the Court, not merely on special occasions, but whenever any indictable charge is preferred. His functions should be to watch the case as it is opened, to observe the demeanour of each party, and, if necessary, to take the conduct of the prosecution into his own hands. No person is fitted to carry a criminal charge before that ultimate tribunal, which is to

\* Judicial Statistics, table 3, p. 12.

decide finally as to the guilt or innocence of the accused who has not thus been present and noted the vivid and suggestive action which attends the opening of the case before the justices. Except in rare instances of strictly legal and technical points, the perusal of the statements and depositions is a very imperfect means of mastering a criminal charge; and we think that the efficacy of any system of prosecution depends far more upon the way in which the case is conducted before commitment, than upon the way in which it is subsequently managed. Of course, we exclude those offences which approach the conditions of *causes célèbres*. We mean that the pursuit and detection of every ordinary crime is within the scope of any properly educated and intelligent attorney; that he will be better able to handle it, and to get at the bottom of any mystery or difficulties which may surround it, if he be present from the very beginning of the inquiry; that he seldom needs any technical assistance, and when he does, can always get it speedily from London.

It is clear that those who have hitherto taken this branch of law reform in hand, have been at great pains to create needless difficulties in treating it. A careful consideration of the system which has been approved by long experience in Scotland, shows that a method, which is singularly simple, works in the main with complete success. A large staff of officials would do no good; all that is really required, is a proper Crown attorney for every sessional division, and a similar officer for every large borough.

The only practical difficulty is, to add this new functionary to our present machinery, without disarranging it; and even this difficulty is far less real than it seems. In every petty sessional division of a county, and in every borough, there is already an attorney, who acts as clerk to the magistrates; and who is usually a man of character and skill. His present duties have been already described; and we have pointed out that he is often almost involuntarily obliged to act as a *quasi* prosecutor. We can see no reason why he or his deputy

should not officially conduct or superintend the prosecutions from his court. His position in itself answers most of the conditions required for an efficient public prosecutor. His presence is necessary at the hearing of all charges preferred in the court to which he is attached. He takes down the depositions, which actually embody the evidence, or, at all events, the main part of the evidence, in every prosecution or indictment. He is, as a rule, versed in the principles and acquainted with the practice of criminal law. He is necessarily familiar with the mechanical and technical part of its procedure. In his hands, the labour would be far less than when the case is passed after commitment to an attorney, who has to master its details from the written statement, which the clerk has himself elicited and arranged. He is well known to, and exercises natural authority over the staff of subordinate officers, who collect the facts. He is in a position which enables him to gain a large personal knowledge of local offenders and their antecedents. All these are conditions and qualifications which it would be impossible to find elsewhere; and they are countervailed by few disadvantages. One, and only one, we find raised in the whole body of evidence taken before the Select Committee. It is, that if paid by fees, a great inducement would be afforded to frivolous, or needless commitments. We do not think that if the mode of payment remained on its present footing, there would be any more needless prosecutions than there now are; at all events, every ground for suspicion could be effectually got rid of by a commutation of the fees for a fair additional salary.\*

It may be urged that there is a certain inconsistency and antagonism between the dual functions of a clerk and prosecutor. Certainly, if these functions were co-existent, they would be antagonistic. But they never could be co-existent.

\* In their letter to the Commissioners on Criminal Law, the Committee of Justices' Clerks suggested a daily allowance of £5 5s. to each clerk during his attendance at sessions or assizes. We see graver objections against this expedient than against fees, and think that the difficulty can only be met by a permanent salary, commuted upon the principle explained further on.



The clerk would be simply a clerk until committal. As soon, however, as the commitment is made out, he would be "*functus officio*" as a clerk, and would be at once clothed with all the duties and responsibilities of a prosecutor. The clerk will do all that he has hitherto done. He will sift the evidence, take down the depositions, often cross-examine a witness. Should any question of law arise, he will, possibly, be conferred with by the justices. If he be a man of judgment and good sense, they may, perhaps, ask his opinion as to the advisability of committing. But the question of a commitment or discharge, finally rests with the justices. And the expression by the clerk of an opinion, when it is asked by the justices, does not cast any direct responsibility upon him. As soon, however, as the committal has been made, the responsibility is shifted on to his shoulders. The conduct of the case is in his hands. Defects in the evidence must be rectified by him, doubts must be removed, or difficulties disposed of. Should circumstances arise, which persuade him that the accused is innocent; or that a conviction cannot be obtained; or that the prosecution has been instituted from corrupt motives; or that public policy would be best served by not pressing it; in any of such cases it would clearly be his duty, and should be in his power, to lay the facts before the justices for their reconsideration. He would thus be able to shift all responsibility from himself on to the Bench. Their decision exonerates him. It is not reasonable certainly to oblige unpaid judges to take this responsibility in cases of doubt as to matter of fact, or difficulty as to matter of law. But the appointment of standing criminal counsel would allow of their obtaining an authoritative opinion for their guidance in such emergencies.\*

The economical merits of such a system are obvious. There are, we believe, between 500 and 600 petty sessional

\* The Committee of the Justices' Clerks' Society do not even allude to this objection; on the contrary, they express a "sincere and deliberate opinion that the clerks to the petty sessions of the division would be the best persons to perform this duty."

divisions in England and Wales. A large proportion of these divisions, particularly in the agricultural counties, are sparsely inhabited, and have very little criminal business. The great centres of manufacturing and commercial industry, from their large population, the quantity of exposed property, and the other opportunities for crime which they afford, naturally attract the criminal classes. The consequence is, that the pursuit and detection of crime is chiefly conducted in our large towns. The census returns for 1861 give the West Riding of the county of York a population of 1,507,511. In the year ending September 29, 1861, the indictable offences committed within its limits were 2,501. But of these offences 1,463 were committed in the boroughs of Leeds, Bradford, and Sheffield alone.

The other six town police districts afforded 258, leaving only 846 indictable crimes to be distributed over the whole of the rural parts of the Riding. When, however, we examine the statistics of the detection of crime, we find that in the year ended September 29, 1861,\* only 1,735 persons were apprehended for the 2,501 offences committed, and that of these only 1,088 were committed or bailed for trial.

For the million and a half of inhabitants in the West Riding there were 1,088 prosecutions by indictment during the year. Of these, the three boroughs, Leeds, Sheffield, and Bradford, had 550; rather more than one half. The other six town police districts had 161 between them, leaving 377 to be divided amongst the county sessional districts. These sessional districts are 24 in number. Distributing the 377 indictments roughly, but for our purpose quite accurately enough, we find an average of about 15 prosecutions for each magistrate's clerk throughout the county sessional divisions of the Riding.

Mr. Horn, the clerk of arraigns on the Western Circuit, in his evidence before the Select Committee on the Prosecutors

\* Judicial Statistics, 1861, table 3, p. 12.

Bill,\* gave a return of the attorney's fees on each prosecution, which made the average £2 3s. 2d. per case. We believe this is a correct estimate, taking the prosecutions at the sessions and assizes, and that two pounds may be safely assumed to be the average net profit made by the prosecuting attorney in each case.† If this average be allotted to the West Riding prosecutions according to the returns analysed above, the following fixed salaries might be allowed to a Government prosecutor, without adding to the existing expenses of prosecutions:—

Leeds . . .	£564	Wakefield .	£112
Sheffield .	346	Doncaster .	66
Bradford .	190	Huddersfield	60
		Halifax . .	56

A sum of £782 would remain to be distributed amongst the sessional districts of the county and the small borough and liberty district of Pontefract and Ripon. These salaries might be allowed without any direct additional charge, and such an arrangement would materially reduce the cost of prosecutions in other ways.

In the larger boroughs, of course, the magistrates' clerk would be quite unable to undertake the duties of public prosecutor in person. At Leeds, for instance, a deputy would be required, whose services should be exclusively devoted to this department of the criminal business of the borough. At Sheffield and Bradford, an experienced clerk would have to be added to the existing staff of the magistrates' clerk; but his time would not be by any means completely occupied by the work connected with prosecutions. These deputies or clerks would, of course, act under the direction of the magis-

\* Evidence, Q. 2,688.

† The fees vary very much at sessions and assizes throughout the kingdom. At the Manchester sessions the allowance is £2 10s. for each ordinary case: and at Liverpool the allowance in similar cases is £2, though the public prosecutor receives a fixed salary at both towns. At Leeds the sessions' allowance is only 17s. 2d. per case, which is divided among the prosecuting attorneys. The average net profits on sessions and assize prosecutions from Leeds during the last three years was only £1 3s. 8d. per case, including the important cases in which extra costs were allowed.

trates' clerk. Whether they should be his servants, or whether their appointment and removal should be in the discretion of the justices, is a question of detail not worth discussion here. We lean to the opinion that the clerk should have the absolute power to employ and discharge his subordinate officer, and be responsible for his acts. The other town districts would not require any additional clerk at all. At Doncaster or Wakefield, for example, there would be an average of between thirty and forty prosecutions a year. These would be distributed over four sessions and two assizes.\* The justices' clerk would be in possession of all the facts, and physical *indicia* presented upon the hearing of each charge before the petty sessions; and, in the great majority of cases, its management at the sessions or assizes would be merely mechanical. But at this point a practical difficulty presents itself. The prosecution of one criminal charge from a town district not large enough to support either a deputy or clerk for prosecutions, would involve the absence for several days of the justices' clerk himself from his duties. We think that this difficulty would be obviated by arranging the lesser town districts in circles of two or more. The cases should be got up, and the briefs prepared by the justices' clerk for each town; but the justices' clerk for each town should, in his turn, conduct the whole of the prosecutions within the circle to which he is attached, except in cases of importance. The very small town districts which have an average of not more than twenty prosecutions a year, should be included in the sessional divisions.

In dealing with the county sessional and smaller town districts, we are met by two practical difficulties. In the first place, the clerks of rural or small town districts are, as a rule, far less experienced in criminal law and practice than their brethren in the towns. In the second place, the number of prosecutions from each district would be so small, that the attendance of an officer from each district at sessions and assizes would be quite out of the question. We would sug-

\* In the particular cases given, there would also be a winter gaol delivery.

gest, that the justices' clerks for sessional divisions and small town districts should act as deputy-prosecutors for their divisions or districts, under the superintendence of a Crown attorney or county prosecutor, who should always be the justices' clerk to the magistrates for the assize town or his deputy. This official should have complete control over all the criminal prosecutions in the sessional divisions and small town districts. In cases of importance, the justices of any such division or district should have the power, through their clerk, to require his attendance at any examination before commitment. In all ordinary cases, the deputy prosecutor should, immediately after the commitment is made out, send copies of the deposition to the county prosecutor; and, thereupon, the management of the case should devolve upon him. He should have full authority to call for any further evidence that he may think necessary; and, for this purpose, it should be the duty of the deputy prosecutor to act under his directions. The discretion should also be allowed to him, which we have claimed for the borough prosecutor, of bringing a case again before the justices, after commitment, wherever he thinks that the prosecution should be dropped. The salaries of the justices' clerks, for these sessional divisions and districts, should be fixed upon the principle of commuting, for an additional salary, one-half of the attorney's fees; the other half being devoted to the payment of the county prosecutor. If, for instance, we take the North Riding of York, there were, in the county sessional divisions, ninety-seven prosecutions in the year ending 29th September, 1861,\* representing, at an average of £2 for each case, a fixed salary of £194. Of this sum, one-half, or £97, would be apportioned amongst the justices' clerks of sessional districts in the shape of additional salary; the remaining £97 would be added to the salary of the county prosecutor, who, in this instance, would be the clerk to the justices of York. This official would also be the public prosecutor for the borough, where there

\* Judicial Statistics, 1861, table 3, p. 12.

were, in the same year, twenty-three prosecutions, representing a fixed salary of £46. He would also receive a salary of £12 for conducting the Scarborough prosecutions, which amounted only to twelve; the clerk to the justices of Scarborough receiving an additional fixed salary of £12 per annum as deputy prosecutor. Upon this basis of commutation the justices' clerk at York would receive an additional salary of £155 for his new duties as county prosecutor for the North Riding. Such a salary would certainly not secure the exclusive services of an attorney engaged in a large private practice. But added to that of the clerk to the justices, it would command the attention of himself or an efficient deputy to the criminal business which it represents. This, we believe, would be the case with all the counties where the criminal business is small, and the salaries would not rise above £200 a year. In those counties which afford much criminal business, the salaries would be large enough to engage the services of men who hold a high position in the profession. For instance, if the public prosecutor for Liverpool acted for the South Lancashire district, his salary would be rather more than £2,000 a year. So, if the Leeds prosecutions were taken with the West Riding, they would afford a salary of nearly £1,000 a year. But in every case we think that it would be better, and in the end more economical, to fix the salaries of the county prosecutors on a liberal scale. The additional expense would be a merely fractional increase in the cost of prosecutions, while the presence of able and experienced officers in the capacity of Crown prosecutors would give new dignity, power, and efficiency to this branch of our legal administration. And this increased efficiency would create a saving which would far more than balance the difference between a bare and a liberal salary.

We have discussed this subject of Crown prosecutions in detail, because it involves the most important of all the reforms called for in our system of criminal procedure. We believe that its introduction has been retarded because no one

has been at the pains to deal with it practically ; and we have, therefore, endeavoured to show how the principle may be adapted to the existing system without disturbing its machinery, or adding to its working expenses.

We will only add a few words on one important moral effect which would be produced by the change we advocate. We believe that it would at once raise the character of the profession, and remove some of the worst elements that at present degrade its practice and lower its tone.

The detection of crime, the pursuit and apprehension of offenders, and the prosecution of them, are all equally the duty of the State, and form no legitimate part of the ordinary business of an attorney. The evidence given before the Select Committee showed plainly that the open field of criminal prosecutions is a nursery for low practitioners. It is work which is avoided by professional men of any standing, and is sought for only by attorneys of low caste. It is time we should be rid of a system which only helps to support a class of men who, if they have not ceased to be honest, have certainly ceased to be scrupulous, and do no credit to the profession.

There is, however, another class which claims a certain kind of vested interest in the prosecution of criminals. How would this change affect the Bar? It could certainly do no harm ; probably would do good. The only abuse to which it could lead would be that of favouritism. But the standing of the public prosecutors, the control of public opinion, and the well-known ability of the Bar itself to look after its own interests, would probably counteract any such tendency. The patronage would be vested in a body of men far better qualified to exercise it fitly and fairly than is the case at present. The county prosecutor, the town prosecutors, the justices' clerks for the smaller town divisions, and the justices' clerks for the county sessional divisions, would all have some influence in the selection. Their independent position would enable them to act without fear or favour. The weak and unjust system of "souping" would come to be discounten-

anced. Briefs would be distributed on something like a principle. And those men who attend circuit from mere vacancy of life, or love of change, or those who never should have aspired to the forum at all, would miss the undeserved guineas, and soon be missed from their accustomed seats. Here, too, in the higher as in the lower walk of the profession, the new system would serve a moral purpose. For here, too, the pettifogger and the low attorney are represented by men who have equally fallen from the high estate of their common profession; who, after a fashion, can seek for briefs as the former seek for prosecutions, and who violate the traditions of the Bar.

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ART. VI.—CONVEYANCING. BY LEWIS. -

*Principles of Conveyancing, explained and illustrated by concise Precedents. With an Appendix on the effect of the Transfer of Land Act, in modifying and shortening Conveyances.* By HUBERT LEWIS, B.A., late Scholar of Emm. Coll. Camb., of the Middle Temple, Barrister-at-Law. London: Butterworths. Hodges, Smith, and Co., Dublin.

CAN anything interesting or attractive be said about Conveyancing? Can the nooks and corners of second and third floors in Lincoln's Inn speak so as to please and instruct? Nay, can they make themselves intelligible? Is Conveyancing an art or a craft—or is it a science, as some of its more enthusiastic votaries affirm it to be? It may not be easy to answer these questions; but the transcendent importance of a legal system that so really and practically deals with the rights and titles of property appeals not less to the instincts of the multitude than to the knowledge and experience of the lawyer; and it has a history—a history of learning, and



thought, and practice—that may be reckoned, not by days and months, and years, but by ages. Were we indeed to trace it to its origin, we should find it to be coeval with property itself; and scarcely any people or community could be shown to be so rude and barbarous as to be without certain established forms and ceremonies for the gift, bargain, or contract. Among the Romans it was customary to pronounce a set form of words, accompanied with the breaking of a rod or straw. The Scythians used to pierce the arms or fingers of each other, and then suck the blood from them. In Scotland, it is said anciently to have been the practice to lick and join thumbs; and it is not so very long since with ourselves that the evidence of particular boundaries was preserved by whipping schoolboys on the spot, they receiving a stated fee for the permitted castigation out of the parish funds. Such primitive simplicity ere long gave way to written forms, on which the legal world have so improved that verbosity and prolixity have become almost as ridiculous as the rather distinct than tasteful procedure noted above; while, however, it must be acknowledged that the more modern practice was the less intelligible of the two epochs. The mystery of Conveyancing verbiage, indeed, has often and not unjustly been the theme of ridicule to satirists and of lamentation to philosophers. Jeremy Bentham used bitter words on the irritating subject, and indulged in a bilious onslaught on the “Company of Conveyancers,” and “the firm of *Eldon* and Co. ;” and he even was at pains to explain that the involution of prolixity might produce an evil effect on the intellectual calibre of the profession, by reason of the “danger of the draughtman’s mind losing itself in the mizmaze.” But when he tried his own hand at the business, our philosopher scarcely came up to the standard of neatness and sense, by reducing the form of a Conveyance to a schedule in numerals, with blanks to be filled up according to the facts of the transaction—although there is no saying what may be the case in the year of grace 1925, the period with which he synchronizes the adoption of his

form. On the other hand, it would be as impracticable to contend that the composition of legal instruments ought to be fashioned by literary rules as it would be to apply the test of an exact symmetry to the Conveyancer's legal learning.

There is, however, a Conveyancing literature, if we may use the delicate term in such a connexion. But as usually displayed, it is of the cold and ungenial sort, with little to encourage or animate the student. And it is this very repulsiveness of Conveyancing which, probably more than anything else, has kept back the system, making it all but impervious to law reform, and preventing its dark recesses from being illumined and opened up by the operation of modern principles. And yet our legal traditions are replete with evidences of its power. It has played a great part in the growth and authority of our jurisprudence, and the Statute of Uses is one of the many tributes to its resources.

It may, indeed, be questioned whether the great majority of works on Conveyancing are law books in the proper sense of the term. They are rather elaborated repertories of form, and stores of practice for the service of the initiated; and we had imagined that an elephant might as well attempt to dance with grace as for a Conveyancing author to write with elegance, or even with method. It was, therefore, with a rather languid curiosity that we took up Mr. Lewis's work with the view of glancing at its contents. But the preface arrested our attention, and the examination we have made of the whole treatise has given us, what may be called a new sensation, pleasure in the perusal of a work on Conveyancing. We have, indeed, read it with pleasure and profit, and we say at once that Mr. Lewis is entitled to the credit of having produced an extremely useful, and at the same time original, work. This will appear from a mere outline of his plan, which is very ably worked out. The manner in which his dissertations elucidate his subject is clear and practical, and his expositions, with the help of his precedents, have the best of all qualities in such a treatise, being eminently judicious

and substantial. In his preface, to be sure, Mr. Lewis does not say much when he informs us in his opening sentence that the work "was undertaken in order to supply something to bridge over the passage from the study of the law of real and personal property, to that of the application of its principles to the preparation and construction of conveyances," for that, of course, is what all such works undertake to do. He interests us more when he informs us that, for the benefit of the student,

"the author has prefaced a course of dissertations founded on and illustrated by a progressive series of precedents in conveyancing, arranged on a new division of the subject. He has laboured to omit from the forms all that is really unnecessary or useless ; and he has embraced in the dissertations explanatory remarks which commence with the most important part of the instrument, and in which, as well the reasons of the omission of any customary clauses or words, as the necessity or use of the forms adopted are attempted to be set out ; and generally, he has endeavoured to introduce the reader to the novelties and difficulties of the subject by degrees."

It is satisfactory to know, on Mr. Lewis's authority, that there is a growing tendency among Conveyancers to cultivate brevity, and this appears to be especially the case in the country ; provincial drafts being thus the *corpus vile* to be, in the fulness of time, operated upon for the benefit and calm enlightenment of Lincoln's Inn. Lest, however, it should be thought he was giving too great indulgence to the provincial taste for brevity, at the expense of useful learning, he observes :

"The endeavour, however, to trace out the origin, object, effect, and legitimate employment of various portions of the precedents in general use, and to clear away some of the many repetitions, useless clauses, and excessive verbiage now in vogue, rendered necessary, in some cases, discussions of somewhat recondite matters ; and the attempt to generalize the explanations, so that the reader might apply them wherever they have any pertinency, has occasionally still further increased the elaborate nature of the remarks."

He very wisely adds :

“But it may be doubted whether summaries, epitomes, and abridgments of the law, or mere exhibitions of its bearing on particular cases, without clear statements of the principles and reasons on which it is founded, serve any other purpose than to enable a student to pass an examination, and to beguile the young practitioner into the mistaken notion that he is master of a subject which he has only begun to understand. It is submitted that full explanations of matters which ought to be understood will be easier of comprehension and remembrance by those who are by nature qualified to undertake the practice of the law, than pithy definitions and and sharp-cut rules.”

Mr. Lewis asks for indulgence as “a pioneer in an almost untrodden path,” although he pays a tribute to the learning and genius of the late Mr. W. F. Cornish, who may still be remembered by many as a gifted and accomplished lawyer. Mr. Cornish died before he had attained his thirtieth year, having therefore, in a comparatively brief period, accumulated the learning and knowledge of legal business which his works so remarkably exhibit. Mr. Cornish was a large contributor to this Journal, and an obituary notice of him will be found in the *LAW MAGAZINE* of 1830 (vol. iv. p. 517). Mr. Lewis remarks that Mr. Cornish’s work on Purchase Deeds is the only one he is aware of which is in any manner kindred to his own; it, however, he says, relates to obsolete forms and to special transactions; and although excellent as far as it goes, does not go far enough in abridgment or explanation. An excellent edition of that work, by Mr. Horsey, was published in 1855, and we hope Mr. Lewis agrees with us in the opinion that Mr. Cornish’s book may still be consulted with advantage.

Mr. Lewis’s division of his subject is, 1st. Conveyance of the absolute interest in various subject-matters from one person to another, which are the simplest and most generic forms of transfer relating to subject-matters; 2nd. Transfer by way of creation of particular interests in the same several subject-

matters; 3rd. The transfers of such particular interests when created from one person to another; and 4th. Conveyances in which several owners of particular interests unite to convey their aggregate rights to another, or to distribute them afresh in a new manner among a new group of particular tenants. But of this division only the first and second parts have as yet been executed. They constitute the volume under review, and, as we fully anticipate the favourable reception the author desires, we hope in due time to receive the remaining portion of his undertaking.

We have not space for any lengthened review, but we commend to particular attention the Introductory Chapter, on the contents of a Conveyance and the order of considering them, which is not only learned but wise and sensible. Speaking of an indenture *inter partes*, and after enumerating the various clauses of such a deed, and remarking that the Conveyance itself is generally conveyed in but a few clauses, he says:

“Of these, the clauses from the testatum to the trusts inclusive are the most important. By them is the transfer effected, and the destination of the property declared. And if they be wrong, accuracy and skill in constructing the other clauses cannot always effectuate a proper conveyance. They are the *most independent* parts of the deed; and, in truth, upon them will depend in great measure the form and substance of the rest of the instrument. The student should, on these accounts, arrange and determine their form and contents first; and we shall, accordingly, in all cases, to assist him, and to avoid anticipation in our remarks, begin our examinations of the examples by commenting upon these parts.”

Chapter VII., on a new form of mortgage, deserves notice. The author gives it as an illustration of his own views, but he fears it may not prevail “over the proverbial inertia and jealousy of novelty begotten by the practice of the law.”

He describes this form

“As an attempt to effect a mortgage, such that the lands shall

revest in the mortgagor or his assigns, without the intervention of a reconveyance, or a simple repayment of the mortgage money, acknowledged by the parties entitled to it; and which yet shall afford the mortgagee all the security necessary for the recovery of his money, and enable the parties taking the mortgage debt alone to sell, and make good title to the purchaser."

In his Appendix he follows in the wake of Lord St. Leonards, by subjecting the Transfer of Land Act to a criticism which is not very favourable to the ready adoption of the machinery it provides, or rather professes to provide, for securing a good title.

Mr. Lewis's work is conceived in the right spirit. Although a learned and goodly volume, it may yet, with perfect propriety, be called a "handy book." It is, besides, a courageous attempt at legal improvement; and it is, perhaps, by works of such a character that law reform may be best accomplished.

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## ART. VII.—CONVICT DISCIPLINE.—REPORT OF THE PENAL SERVITUDE COMMISSION.

*Reports of the Commissioners appointed to inquire into the Operation of the Acts (16 & 17 Vict. c. 99; and 20 & 21 Vict. c. 3), relating to Transportation and Penal Servitude.*

*Papers and Discussions on Punishment and Reformation: being the Transactions of the Third Department of the National Association for the Promotion of Social Science. London Meeting, 1862.*

*On the Treatment of Convicts in Ireland.* By Four Visiting Justices of the Wakefield Prison.

• *Our Convict Systems.* By the Rev. W. L. CLAY, M.A.

*The Immunity of "Habitual Criminals."* By Captain Sir WALTER CROFTON.

*The Intermediate Prisons a Mistake.* By an Irish Prison Chaplain.

*Irish Fallacies and English Facts.* By Scrutator.

*The Transportation of Criminals: being a Report of a Discussion at a Special Meeting of the National Association for the Promotion of Social Science, held at Burlington House, on the 17th of February, 1863.*

*Society for Promoting the Amendment of the Law. Report of the Special Committee on Convict Discipline.*

THE public is liable to periodical panics on the subject of crime. Every now and then an apprehension arises that the evil and dangerous elements, which lie under the surface of modern society, will escape control, defy repression, and put an end to security. We are just emerging from one of these panics, of which the Blue Book, at the head of the long list of publications before us, is the latest result. The issue, on the 29th of December, 1862, of a Royal Commission, to inquire into the working of the Penal Servitude Acts, was announced in the midst of an eager public controversy on the merits of the English and Irish systems of convict discipline, as means of repressing and diminishing crime, which for the last two years has appeared to be alarmingly on the increase, both as regards the number of offences and their magnitude and daring. There followed a comparative lull in the controversy in expectation of the result of the inquiry, though from the constitution of the Commission it was generally expected to be anything but favourable to the Irish system.

On the 2nd of July, a column of the *Times* was devoted to what purported to be an account of the Report about to be given to the public. According to this account, the Irish system stood completely condemned. But it speedily became known that the statements there made were not to be depended on;

and in a few days the Report itself proved them to be utterly at variance with the truth. The unaccountable misstatements contained in the article are the more to be regretted inasmuch as many who take an interest in such questions rely upon the leading journal for a faithful digest of a bulky Blue Book which they have not the time to read. And although, in the same journal, there has since appeared another statement of its contents which does not convey exactly the opposite conclusions, inasmuch as it quotes the summary of recommendations in the words of the Commissioners, it utterly fails to bring out the strong and emphatic approval of the leading principles of the Irish system which the Report pronounces. Before attempting to do this, in justice to the Report, which is very valuable, but which the *Times* characterizes, probably in self-justification, as "not worth reading," it may be useful to glance back at the previous state of the question.

At the meeting of the National Association for the Promotion of Social Science, in June, 1862, Sir Walter Crofton, and the late Sir Joshua Jebb put their respective systems of convict discipline to the test of a public discussion. The discussion thus opened was carried on without intermission up to the close of the year. A perfect storm of pamphlets was showered upon the public. *Facts and Fallacies* served equally for attack and defence—the facts of one party doing duty as the fallacies of another, and *vice versâ*. The press took up the subject, and, on the whole, treated it with great candour and ability. Most of the higher Reviews, including the *Westminster*, the *Edinburgh*, and the *Quarterly*, ranged themselves on the side of the Irish system. In short, no public question was ever more thoroughly sifted. But turning back to the Report of the Social Science discussion, though the amount of evidence has been overwhelming, nothing has been added to the arguments brought forward or the conclusions urged in the papers there published. It may appear a trespass upon public patience to recapitulate



the points in these arguments, but these papers afford a complete survey of both sides of the question, and that question one which is still to be decided.

The paper contributed by the late Sir Joshua Jebb gives a rapid sketch of the history of transportation, in order to show that the ticket of leave was first applied in the colonies, as part of his own system, to which he calls attention as having been "successfully carried out in Ireland." When transportation ceased, and the Amending Act of 1857 followed the original Penal Servitude Act of 1853, the following were the conditions inscribed on the licence, except that "will" stood in the place of "may," till its application was more than doubtful :

"1. This licence is liable to be revoked in case of misconduct.

"2. It *may* be revoked in the case of the holder of it being convicted of any new offence, unless the punishment for that offence extends beyond the term of his former sentence.

"But it is not necessary that the holder should be convicted of any new offence.

"If he associates with notoriously bad characters, and leads an idle and dissolute life, with no visible means of obtaining an honest livelihood, he will be liable to be re-committed to prison under his original sentence.

"3. If his licence is revoked, he *may* have to undergo the whole remaining portion of his original sentence."

Starting from this point, the whole matter may be put into the question, What entitles a convict to a ticket of leave ; and to what kind of treatment does a ticket of leave entitle a convict ? The difference between the rival systems lies in the answer to this question. "The systems are identical in theory and design," says Mr. Burt, echoing Sir Joshua Jebb. In both, the first stage is separate confinement ; the second, associated labour ; and the last, release under ticket of leave. Before this last, the Irish system introduces the intermediate stage of associated labour and comparative freedom ; and, finally, insists on the fulfilment of the conditions of release. But

the Rev. Mr. Clay points out most clearly the differences between the two systems, before their apparent divergence at the intermediate stage. Mr. Burt says, as against the Irish system, "it may be denoted 'The Reformatory Theory.' It is based upon the legislative principle, that criminals ought to be imprisoned to be reformed. It asks for sentences long enough to reform them; it allows that they may be set free when they are reformed; and, in its full development, it asks that they may be kept until their reformation is effected." But the theory of the English system is generally supposed to be the reformatory one. If not, what is it? It is certainly not the punitive theory, as the admirable articles on "Prison Life in Portland," which appeared in the *Times*, plainly proved. It is as clearly not the preventive one, as riots and mutiny within the prison, and re-convictions for renewed offences without, testify. And, after all, it is not a bad theory, provided it could be worked out, that converts as many rogues as possible into honest men, and turns the prison key upon the remainder who refuse to be so converted.

The Irish convict forfeits freedom to the full extent of his sentence; but from the moment when he enters his cell, a system begins by which comparative liberty can be gained.

The English convict, by complying with the routine of the prison, by simple abstinence from breaking its rules, is at once placed in the first class of the second stage, which entitles him to better food and more gratuity than if he had been "outrageous." The Irish convict gains, by good conduct, only the lowest of four classes, through all of which he must mount, with no other stimulus than the awakened desire for improvement, and the prospect of earlier liberation. There is no appeal to the appetite for good rations; and the increase of gratuity, from class to class, is only from 1*d.* to 9*d.* In England it begins in the first stage at 8*d.*, and in the second, at 1*s.* 3*d.*

In England it is held that a man is entitled to a ticket of leave, because he has passed a certain time in prison without

being as idle and unruly as he might have been. In Ireland, he is not entitled to the ticket till he has shown by every test which can be applied that he is fit for freedom. Sir Joshua Jebb has stated his belief, that an intermediate system would "demoralize English convicts." "It would be too great a risk to send them messages; they would run away." There is the risk, otherwise there could be no test, but the Irish convicts do not run away, or, if they do, they are brought back again, with consequences.

The last and greatest difference between the two systems consists in the enforcement of the conditions of the ticket of leave in the one, and their total neglect in the other. In Ireland, the principle that the offender has forfeited his freedom to the full term of his sentence, is effectively carried out by a system of police supervision. In England, a deduction is made from the sentence of the judge; and the prisoner, on his release, may wander whither he will unwatched and unrestrained; and, unless he thinks his ticket of leave may act as a sort of charm to preserve him from punishment, he will find it useless to carry with him that bit of waste paper. Thus, all trace of him is lost, unless chance should discover him at the criminal bar, even before the original term of his sentence is completed. Sir Walter Crofton tells us that the conditions attached to licences have been found most valuable, and their enforcement quite practicable. The supervision is a severe test of the liberated convict. He is free when he receives his licence to return to labour and to society, yet bound to live openly and honestly, on penalty of forfeiting that freedom to the full term of his sentence. He can at once be identified, and, if re-convicted, can be dealt with accordingly.

Sir Walter thus states the argument for supervision :

"I do not think it is well possible to exaggerate the importance of supervising the convict after his liberation; for if, on entering the prison, as in Ireland, he is properly instructed as to the course which will be pursued on his discharge, he will, from the difficulties

with which the commission of crime will be surrounded, be more inclined to co-operate with those who are endeavouring to amend him. It is obvious also, that by making the punishment of crime more certain, and by diminishing the possibilities of old offenders (through want of recognition) escaping with light sentences, we shall materially reduce the criminal class. I am entitled to speak strongly upon this subject, because I speak after many years' practical experience."

Another paper brings forward the difficulties which would attend the introduction of the Irish system into England, in which the following sentence occurs:—"For such ticket-of-leave men as openly obtruded themselves on the notice of the police, by entering on a course of crime or were reported for doing so, the fact being properly established, might be sufficient to warrant forfeiture of licence, even though no conviction had taken place." The chief difficulty stated is, that supervision is opposed to practice and public opinion. Mr. Burt concurs in thinking supervision desirable, but is afraid to intrust it to the police. If the lives and property of honest citizens are intrusted to them, it is difficult to see why they should not be intrusted with looking after felons still under sentence. It is a great and notable argument that the felons do not like the idea of it; but, strange to say, the argument is put forward as against and not in favour of the supervision. We were told the other day by the visiting justice of one of the county gaols of England, that he had to listen to the complaint of the surgeon against a sago diet. "Does it do the men harm?" asked the magistrate. He was obliged to confess that the men kept their condition tolerably; but then, "they did not like it." When the free working man sits down on a stone, in one of the Portland quarries, to eat his bread and cheese, while the convict drops his lazily wielded tools an hour earlier, to march back to prison and make a little toilet before he sits down in his cell to a capital warm dinner of soup and meat, &c., the argument does not seem to be so very inconsistent after all.

With regard to the results of the two systems the evidence is, of course, completely contradictory. There is, however, one thing brought out. Tested at Wakefield, the relapses under the English system, which, it must be remembered, professes to lose sight of the licence holders, were from 40 to 45 per cent.; while the highest number of re-convictions charged against the Irish system, and estimated by its opponents, is only 13 per cent., the Irish system taking special pains to ascertain and secure re-convictions.\*

On the evidence then before them, the Council of the National Association, on the 19th of February last, passed the following resolutions, which we give, in order to show how completely the conclusions arrived at by the Royal Commission agree with them, except on the question of transportation :

“ 1. That the failure of the present system of convict discipline in England is chiefly due to the short sentences frequently passed on habitual criminals, the want of an efficient probationary stage for convicts under sentence, and of police supervision over discharged prisoners.

“ 2. That these defects would be remedied by adopting and carrying out the principles of the convict system which has been so successfully administered in Ireland.

“ 3. That it is not desirable to attempt any return to the old system of transportation, which, apart from the opposition it would provoke from the colonies, would entail heavy and permanent expense on this country, without producing any adequate advantages, or any results which would not be better, as well as more cheaply, obtained by well-regulated convict establishments at home.

\* We are informed by the present sole Director, Captain Whitty, that the following is the true state of the case on this point:—

From 1856 to 1861 inclusive, 2,039 males have been discharged from intermediate prisons, and of these only 76 were sentenced to the convict prisons, being 3·72 per cent.

In the same period, 1,509 males were discharged from ordinary prisons; and of these 226 were re-sentenced, being 14·5 per cent.

The percentage of males from refuges, who have been re-sentenced, amounts to 6 per cent., nearly 23 out of 386.—*Observations on the Treatment of Convicts in Ireland: by four Visiting Justices of the West Riding Prison.*

"4. That at the same time it is most desirable to encourage the emigration of criminals sentenced to penal servitude, who shall have by steady industry and labour whilst in prison, or whilst under probation, saved sufficient to enable them to defray the whole or the greater part of their passage money to any colony they may select."

The Council of the Law Amendment Society also issued a report founded on a series of resolutions in all respects similar to those of the Social Science Council, of which we need quote only one as even more definite in its language than any of the latter.

"That the preliminary imprisonment should be made more severe ; that a system of marks should be established in the second stage of labour ; that intermediate prisons on the plan of Lusk and Smithfield should be organized, and that a strict supervision should be exercised over convicts discharged on tickets of leave, the conditions of which should be stringently enforced."

The conclusions of the Report with regard to the causes of the increase of crime, might be stated in the exact words of the first resolution of the Social Science Council. The Report states, "that a large percentage of those discharged from convict prisons are known to be re-convicted, while many more probably are so, but escape detection from the absence of any means of ascertaining the previous history of those convicted." The want of efficacy in the present system, according to the Report, is mainly attributable to the shortness of the punishment generally inflicted upon convicts, and in a minor degree to the defects in the discipline to which they are subject, and the want of any proper means of supervision of convicts released on ticket of leave ; in short, from too early release, and release under conditions which have never been enforced.

The Commissioners recommend :—

1. That convicts discharged on ticket of leave should be placed under the supervision of officers appointed for the purpose of enforcing the conditions of the licence ; and that

upon a licence holder being convicted of a very serious offence, the portion of his original sentence unexpired at the time of his second conviction should be undergone after the termination of the second sentence. They also recommend a longer sentence upon re-conviction, rejecting the suggestion that no remission should be allowed on a second conviction, which the Commissioners think would remove the "chief inducement to industry and good conduct while undergoing punishment."

2. That the shortest term of penal servitude should be seven years.

3. That the prisoners should earn a remission of their sentences by industry, recorded by marks, calculated daily by the amount of work done by each.

The Commissioners reiterate their conviction that "the hope of earning some remission of their punishment is the most powerful incentive to industry and good conduct which can be brought to bear upon the minds of prisoners." The making of that remission a right to be forfeited, instead of a reward to be hardly earned, wholly destroys the principle. This the Commissioners allow that the English system does; they also take exception to some of the regulations of the Irish system, but they pronounce it "a nearer approach to the best system." In point of fact, they go [further in the same direction, and make remission depend still more closely on the individual exertions of the convict.

4. That separate confinement should continue for not less than nine months, and be made of the same deterrent character as in Ireland, by means of lower diet, more monotonous labour, and no gratuities.

5. That the Irish plan of dividing the convicts into classes, according to their behaviour, should be adopted. "Some classes might be made more penal than others, in respect to diet or otherwise; others, on the contrary, being more assimilated in discipline to the advanced classes in the Public Works Prison in Ireland."

6. That corporal punishment, more severe than is allowed at present, be inflicted for prison offences, such as acts of violence against officers or fellow convicts.

7. That gratuities should be reduced, and that the period during which they can be earned should begin much later in the sentence.

8. That to obviate the difficulty of finding employment for discharged convicts in this country, all able-bodied male convicts, with certain specified exceptions of criminals deserving the utmost severity of the law, should be sent before the expiration of their sentences to Western Australia, to be there treated as in the Irish intermediate prisons, and released under supervision.

9. That those released on ticket of leave at home be placed under strict supervision.

There are many other minor recommendations, calculated to make the more important ones effective in the highest possible degree—such as schooling to be carried on after working hours; communications with free labourers on public works to be cut off, and gratuities to warders for work done by prisoners to be commuted for salary.

The Commissioners thus recapitulate :

“In order that our views may be more clearly understood, we beg, in conclusion, to state that we consider the following to be the most important of our recommendations :—

“1. That sentences of penal servitude should not in future be passed for shorter terms than seven years.

“2. That the principle, already recognised by the law, of subjecting re-convicted criminals to severer punishment, should be more fully acted on.

“3. That convicts sentenced to penal servitude should be subjected, in the first place, to nine months' separate imprisonment, and then to labour on public works for the remainder of the term for which they are sentenced, but with the power of earning, by industry and good conduct, an abridgment of this part of their punishment.

“4. That all male convicts, who are not disqualified for removal



to a colony, should be sent to Western Australia during the latter part of their punishment.

“5. That those who may be unfit to go there, but may earn an abridgment of their punishment, and who may consequently be discharged at home under licence, should be placed under strict supervision till the expiration of the terms for which they were sentenced, and that the necessary powers should be given by law for rendering this supervision effectual.”

From this Report three of the Commissioners dissent, and two of these withhold their signatures.\*

Mr. Henley refuses to sign because he is opposed to the principle of release on licence. Mr. Childers signs, agreeing generally with its recommendations, but protesting against the proposals as to transportation, because, in his opinion, the measures proposed, “while costly to this country and odious to her colonies, would at best afford a brief delay in the solution of a question daily becoming more difficult.”

With Mr. Childers’ protest we most entirely agree. The cost to this country of sending out from 1,000 to 1,500 convicts yearly, of providing for them establishments and efficient superintendence during the portion of their sentence which it is proposed they should spend there in prison, previous to obtaining their licences, would be enormous. If the present demand for labour in the colony would, is as stated, enable it to receive them, and if that demand is likely to increase as its resources become more developed, the natural result of such a demand would be and ought to be a free immigration. As a proof of the success attainable by one branch of industry in the colony, it is mentioned that a settler, who was only a labouring man in 1850, had lately sold his year’s clip of wool for £1,000. Ought the convict to find such a field more open to him than the free labourer? If a considerable influx of free labour took place, Western Australia would follow the

\* The Report was signed by—

Grey.

Naas.

Cranworth.

E. P. Bouverie.

J. S. Pakington.

S. H. Walpole.

H. Waddington.

Russell Gurney.

O’Conor Don.

Hugh C. E. Childers.

example of our other colonies and reject the convicts altogether. But if the numbers to be sent out discouraged a free emigration, by supplying sufficient labour at the expense of the home government, the colony would be dependent on the increase of its criminal population for its growth and development. The state of society which would grow up in a colony to which 1,500 convicts were sent yearly may be imagined. It is also recommended that no female convicts should be sent out, but that Government should encourage a free female emigration in order to provide wives for the convicts yearly released. What class of women is it believed would take advantage of this brilliant scheme? It closes the colony to all women with any remnant of self-respect. They must have small hope of their country who think that its working women would not rather starve at home—the fate of a good many of them—than go abroad for such a purpose. It is well known what class of women fill our prisons. Assuredly no other class would emigrate on such terms. Are these the materials of which to make a nation? One of two things is inevitable: either Western Australia would become a mere penal settlement—with the criminal element so strong as to require constant and strong coercive repression—expensive, odious, and useless; or the free labour element will increase, and at last refuse to allow the criminal force to receive fresh accessions. This argument does not apply to the emigration of discharged prisoners who have given evidence of reformation tested by freedom under supervision at home. They would start as free men, and, having endured the full penalty of their offence, on equal terms with the free labourer. The gratuities they have earned in prison might go toward paying the expense of their emigration, so as to place them on an independent footing.

We have still to notice the chief dissenting memorandum attached to the Report—that of the Lord Chief Justice. It is of considerable length, and is, of course, entitled to great consideration. It begins by stating that penal servitude was

devised as a mode of punishment for offenders for whom imprisonment in ordinary prisons would have been inadequate. The discipline in these prisons is so severe that it cannot be inflicted beyond a certain limit, with a proper regard to humanity. Therefore, in order to increase the punishment, it became necessary to prolong the sentence; but, in doing so, it was also necessary to decrease the severity of the punishment. That from this cause penal servitude has lost its power to deter, the Lord Chief Justice concludes, after a very careful and judicial weighing of the argument, and all its balancing considerations; but he finds the weakness of the system "in the manner in which the punishment is inflicted, rather than in the periods to which it has been extended." Moderate labour, ample diet, substantial gratuities, with the remission of a fixed portion of the sentence, are hardly calculated, he adds, to produce on the mind of the criminal that salutary dread of the recurrence of the punishment which may be the means of deterring him, and, through his example, others from the commission of crime. He allows that this inherent insufficiency of deterrent power has been much aggravated by the want of supervision over discharged prisoners—a necessary part of the system he condemns. He lays down, that the principal value of punishment consists in its effects in deterring from crime; and that it is on the assumption that it will have this effect, that its infliction alone can be justified; "its proper and legitimate purpose being, not to avenge crime, but to prevent it." Assuming that it has this effect, the Lord Chief Justice argues in favour of greater severity and shorter terms of punishment, and against any remission whatever as weakening the effect of the judge's sentence, by introducing uncertainty. But if we do not grant the assumption, the argument falls to the ground; and is one which the whole course of modern thought and practical experience denies. We have given up the right to avenge; we no longer hold the power to deter. There is no punishment which the wise humanity of our time would

allow to be inflicted, powerful enough to deter the habitual criminal. The treatment of offenders has gradually become more lenient, and, notwithstanding the increase of population and wealth, crime has decreased. It is only the justice—the humanity — of a system of punishment which secures its enforcement. The lower the criminal is in the scale of humanity, the more inhuman would be the punishment required to deter him from crime. We repeat, any deterrent, in the shape of severity of punishment, which we hold in our hands, is powerless on the class for whom it would be required. The strong passions, the seared and blunted feelings of the man inured to crime, offer a resistance which mock at our humane severities. It is binding Samson with green withes, to treat a criminal to severities which must stop “short of inflicting bodily or mental injury.” But society holds in its hands far stronger powers for the repression of crime—the power to reform, and the power to incapacitate.

The working of both of these powers no longer rests on theory, but has received a practical illustration in the working of the Irish convict system; and it only requires the carrying out of the principles adopted in this Report, in the convict prisons of England, to at once secure and to prove their beneficent results.

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## Notices of New Books.

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[\*.\* It should be understood that the Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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**A Selection of Leading Cases on Real Property, Conveyancing, and the Construction of Wills and Deeds : with Notes. By Owen Davies Tudor, Barrister-at-Law. Second Edition. London : Butterworths. 1863. Pp. 1,014.**

It is now fourteen years since the example of Smith's Leading Cases induced Mr. Tudor (in conjunction with Mr. White) to do for equity practitioners what that great work had effected for the common lawyers. The attempt was successful, and the leading cases in equity not only found favour at home, but were transplanted to American soil, where the work was edited by learned and eminent hands. Encouraged by this success, Mr. Tudor, some seven years since, collected and edited a number of leading cases, the knowledge of which is of the greatest importance to the real property lawyer and conveyancer ; and to these cases Notes were appended after the same method as that adopted in the Leading Cases in Equity. The second edition of this latter work is now before us, and we are able to say that the same extensive knowledge, and the same laborious industry, as have been exhibited by Mr. Tudor on former occasions, characterize this latter production of his legal authorship. We are informed in the advertisement to the edition that the Notes have been carefully revised, and much new matter added, the additions consisting of about 170 pages ; and it is hardly necessary to say, that the number of cases cited has been largely increased, and brought down to the latest period.

It should be noticed, that an entirely new case has been added to this edition, that of *Lord Braybroke v. Inskip*, in which the question is dealt with, when mortgage or trust estates will pass under a general devise. Seventeen pages of notes, careful and elaborate, are appended to the case, and constitute a valuable addition to the original work.

It would not be possible, nor would it be consistent with this brief notice, to enter into the details of this volume, which can only

be treated with justice in a lengthy article ; it is enough, at this moment, to reiterate our opinion that Mr. Tudor has well maintained the high legal reputation which his standard works have achieved in all countries where the English language is spoken, and the decisions of our Courts are quoted.

**Jurisprudence.** By Charles Spencer March Phillips. London : John Murray. 1863.

THIS is a clever attempt to construct a system of jurisprudence on the antiquated principle of natural justice. Although we cannot say that the attempt is at all successful, still we have no hesitation in pronouncing the work of Mr. Phillips to be one of great interest. Any treatise upon jurisprudence by an Englishman must naturally excite attention, from the rarity of such a performance ; and the present work is unquestionably distinguished by ability of no common character, by accurate and forcible modes of expression, and by considerable powers of systematic thinking and searching analysis. We do not, however, mean to assert that these qualities are entirely without alloy. There is a tendency to dogmatism and self-confidence which is neither pleasant, nor favourable to truth. On some occasions there is an amount of flippancy which strikes us as not quite suitable to the subject ; and considerable portions of the work are distinguished by an aridity which certainly equals anything we have ever come across in law or in any other department. As Mr. Phillips does not appear to be connected with the profession, we have no scruple in saying that he is by no means sound in his law. What authority has he for laying it down "that every man who publicly professes to exercise any art or trade for hire or profit is compellable to give assistance in all cases where it is required, and will be responsible for the consequences if he refuses to do so?"\* Or what does he mean by saying that "a body of associated individuals may appoint a corporation aggregate, and vest the supreme authority in a *corporation sole*, as in the case of a city whose inhabitants combine to elect a town-council, presided over by a mayor?"† We have detected various instances of a similar nature throughout the work ; and we deeply regret that such slips should occur, as they must inevitably shock the delicate susceptibilities of English lawyers, and prejudice them against a book which, we confess, we should like to see extensively read by the profession.

It is, of course, impossible for us on the present occasion to give any adequate idea of the contents and method of the work. The author defines jurisprudence as "the science which teaches us to analyse and classify the rules of justice," and excludes the idea "that jurisprudence teaches us, or can possibly teach us, what the rules of justice are." After an elaborate introduction, in which Mr. Phillips fully states the principles upon which he proceeds, he treats the subject under two great divisions: First, Natural

\* Sec. 48.

† Sec. 127.

Jurisprudence, embracing personal rights and obligations, real rights and obligations, and statual rights and obligations; and secondly, Civil Jurisprudence, embracing municipal rights and obligations, territorial rights and obligations, and extra-territorial rights and obligations. The following quotation will show the leading object of the work:—"I intend to try by the present treatise the experiment of presenting the science of jurisprudence to the student in its natural shape and order. For this purpose I shall first inquire from what inevitable circumstances the necessity for such a science has arisen. These circumstances, whatever they may be, will constitute the natural elements of the science, and by the various combinations of which they may be capable, the science chiefly, in its simplest and most elementary form, will be composed. The natural and everlasting foundation being thus laid, it will become comparatively easy to comprehend the effect of the various artificial superstructions which the will of man has erected, or may erect upon it. To investigate the details, or even to sketch the outlines of human legislation, is of course no part of my plan, but I shall endeavour to indicate the general principles by which it is connected with, and through which it may be said to form a part of, the universal science of jurisprudence. I believe that the result of this conception, if adequately worked out, will be a clear and comprehensive view of that great system of problems whose solution is the object of law. Every question of right which can possibly arise between two human beings would be stated in its proper succession and connexion, and a method of analysis would thus be provided by which any conceivable system of law might at once be arrayed in precise and perfect logical order."—P. 23. It will be seen at once from the above extract that Mr. Phillips is opposed alike to the utilitarian and to the historical theory of jurisprudence. We cannot, however, say that in formally discussing the question, he has thrown any real doubt on either of the two views, which with certain limitations may very well stand together. His own theory, we venture to think, he leaves very much where he found it. With respect to English law, we may observe that Mr. Phillips considers it capable, by the application of general principle, of becoming "the most perfect system of law whose existence the imperfections of the human intellect will permit." "Such a system," he says, "would consist in a code of fixed rules, founded upon rational calculations of general expediency; and combined with a collection of judicial precedents constantly improved by the additions and alterations of a succession of accomplished jurists."—P. 72.

**A New Pantomime.** By Edward Vaughan Kenealy, LL.D. London: Reeves & Turner. 1863.

It is so rare to find a barrister in successful practice who is also gifted with poetical genius, that such an event should not be passed over in a hurried notice. We had fully intended to do Dr. Kenealy justice in an article, but an unusual pressure on our space prevents



our fulfilling the intention. We should be unwilling, however, to allow this number to pass into print without expressing our conviction of the real genius which is embodied in the "New Pantomime."

**The Institutions of the English Government.** Being an Account of the Constitution, Powers, and Procedure of its Legislative, Judicial, and Administrative Departments. By Homersham Cox, M.A., Barrister-at-Law. London: H. Sweet. 1863. Pp. 757.

**The English Constitution.** By Dr. Edward Fischel. Translated from the Second German Edition. By Richard Jenery Shee, of the Inner Temple. London: Bosworth & Harrison. 1863. Pp. 592.

As we hope to treat of these two works at some length in a future number, we shall confine ourselves at the present moment to a short statement of the nature and objects of each.

Mr. Homersham Cox has collected from ancient and modern authorities a general account of the British Government, of the powers and practice of its several departments, and of the constitutional principles affecting them, in a compendious form. The work supplies a great want in describing the modern functions of British institutions. Copious and authentic authorities are cited in the notes, and the volume opens with an excellent and most useful analysis.

Dr. Fischel's work is perhaps still more valuable as being the independent opinion of a foreigner on the British Constitution, and the institutions which have grown up and flourish under it. It is wonderful that a foreigner should have obtained a knowledge of these at once so extensive and minute as that which this work exhibits. The translation is made from the second edition of the work, and is substantially literal, though some errors have been corrected by the translator, Mr. R. T. Shee.

**Questions for Law Students on the Fifth Edition of Mr. Serjeant Stephen's New Commentaries on the Law of England.** By James Stephen, Esq., LL.D., &c. London: Butterworths. 1863.

We have recently noticed the new edition of Stephen's Commentaries with that approval which is unanimously accorded by the voice of the profession. The work now before us contains a series of questions on the Commentaries, for the use of Law Students. It is, in our judgment, carefully and ably done.



**The Transfer of Land and Declaration of Title Acts, 1862 : with Notes, General Orders, Forms, &c.; and a full Index. By R. Denny Urlin and Thomas Key, Esqrs., Barristers-at-Law. London: William Maxwell. 1863.**

**Shall we Register Title? or the Objections to Land and Title Registry Stated and Answered. By Tenison Edwards, Esq., Barrister-at-Law. London : Chapman & Hall. 1863.**

It appears from a Parliamentary Paper, ordered in June last, that the number of applications as yet made to the Office of Land Registry is thirty-four, comprising property estimated to exceed £500,000 in value ; but only three land certificates have been granted. Nothing has yet been done under the Declaration of Title Act. It is, therefore, still open to theoretical conjecture, how far the recent measures on land transfer are likely to succeed, and the little works of Messrs. Urlin and Key, and Mr. Edwards, may be consulted with advantage on the probable solution of the question. The former, we may say, contains a very good account of the Irish and the South Australian systems, which is a valuable contribution to (if we may use the term) the comparative jurisprudence of the subject. Mr. Edwards gives in a popular way a very clear statement of the objections which have been urged to the registration of title, and the answers that may be made to such objections. Both the books are worth reading.

**A Concise Treatise on the Construction of Wills. By Francis Vaughan Hawkins, M.A., Lincoln's Inn, Barrister-at-Law, Fellow of Trinity College, Cambridge. London : William Maxwell, Bell Yard, Lincoln's Inn. 1863.**

THIS is a synopsis of those judicial decisions which are now the canons of interpretation applicable to wills. Lawyers are much indebted to parish clerks, schoolmasters, and other self-instituted will-makers, for the subtleties of this department of our jurisprudence. Some of the most ingenious arguments and memorable judgments reported in the books are those which settle the legal construction to be put on testamentary words and phrases. Thus, such expressions as "issue," "heirs male of the body," "money," "effects," "lands," "rents and profits," "estate," &c., which constantly occur in wills, have a precise legal meaning, according to which the document will be construed, unless the testator expressly prescribes a different interpretation. The author confines himself to the Rules of Construction ; and, in this respect, his treatise differs from the larger work of Jarman, which embraces, in addition, the Rules of Law. The distinction is clear, and deserves attention. "A rule of construction always contains the

saving clause," unless a contrary intention appear by the will; though some rules are much stronger than others, and require a greater force of intention in the context to control them. "On the other hand, a rule of law is not a rule of construction (as the rule in *Shelley's case*, the rules as to perpetuity, mortmain, lapse, &c.); acts independently of intention, and applies to dispositions of property in whatever form of words expressed. This distinction is fundamental, and lies at the root of the subject." The enigmatical intentions of testators are construed according to the general rules which from time to time have been laid down by the judges. Mr. Hawkins has bestowed much labour in collecting them together from the reported cases, and in illustrating their application. To give some idea of the manner in which the author deals with the subject, we give the following analysis of the Chapter on Residuary Bequests and Devises :—

"Rule.—A general residuary bequest carries lapsed and void legacies." (This rule is explained by brief extracts from four leading cases, *Leake v. Robinson*, 2 Mer. 393, &c.)

"Rule.—A general residuary bequest, contingent on terms, carries the intermediate income which is not undisposed of, but accumulates." (*Trevanian v. Vivian*, 2 Ves. sen. 430.)

"Rule.—In wills made or republished on or after Jan. 1, 1838, real estates comprised in devises which fail or are void, passes under the residuary devise in the will, unless an intention appears to the contrary." (Illustrated by several cases.)

"Rule.—A gift of the testator's residuary *real and personal estate* (blending, though contingent in terms), carries the intermediate rents and profits of the real estate, as well as the income of the personal estate. (*Stephens v. Stephens*, Forest, 228; *Genery v. Fitzgerald*. Jac. 468, &c.) Thus, if the real and personal estate be given to an unborn person, the rents and profits of the real estate do not descend to the heir till the birth of the person entitled, but accumulate."

Every chapter bears evidence of discrimination and good judgment. There is no surplusage. From the nature of the materials, being chiefly isolated judgments, the chapters are necessarily more or less disconnected. A certain want of congruity is perhaps unavoidable in a system of construction elaborated by a succession of judges, some inclining rather to the grammatical or literal, others to the logical or inferential interpretation of testamentary instruments. Those who have not got the last edition of "*Jarman on Wills*," will find this volume, as regards rules of construction, a very excellent substitute.

## Events of the Quarter.

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**ALMOST** the only event in the Parliamentary Session which can be called interesting or important in a legal point of view, is the passing of the Statute Law Revision Bill, and the remarkable speech of Lord Chancellor Westbury on that measure. This speech has been published (edited by Mr. Macqueen), and is not only a lucid exposition of the need for the revision of our law, statute and unwritten, but, what is far more important, it shows *how* the great work may be done, and is an earnest that it *will* be done.

The seventh annual meeting of the National Association for the Promotion of Social Science will commence at Edinburgh on the 7th of October, and continue for one week. Lord Brougham is the President; Lord Curriehill takes the chair of the Jurisprudence Department, and will, we are informed, address the Association on the transfer of land. Professor Muirhead and Mr. Campbell Smith are the Local Secretaries for the Department.

Some time since we stated that a movement had been commenced at Berlin to found an institute in memory of the illustrious Savigny, which had already received support in various countries of the Continent. Since the publication of our last number a corresponding committee has been formed in London, under the presidency of Lord Brougham, and with the view of drawing attention to its objects, we insert at length the minutes of its first meeting:—

At a meeting held at 3, Waterloo Place, Pall Mall, on Wednesday, the 17th of June, 1863, present the Right Honourable Lord Brougham in the chair, letters were read from Sir F. H. Goldsmid, Bart., Q.C., M.P., Charles Austin, Esq., Q.C., Professor Cairns, W. Forsyth, Esq., Q.C., M. D. Hill, Esq., Q.C., Professor Muirhead, expressing their approval of the objects of the meeting.

It was moved by Sir Erskine Perry, and resolved unanimously—

That a committee be now formed in aid of the Fund of the Savigny Institute, and that such committee consist of the following gentlemen, with power to add to their number:—

Lord Brougham, Lord Neaves, Lord Mackenzie, Sir F. H. Goldsmid, Bart., M.P., Sir Fitzroy Kelly, M.P., Sir Erskine Perry, Sir Robert Phillimore, Mr. M. D. Hill, Q.C., Mr. Charles Austin, Q.C., Mr. Forsyth, Q.C., Mr. Thos. Webster, F.R.S., Mr. Joseph Parkes, Mr. G. W. Hastings, Mr. Westlake, and Mr. Wendt.

It was moved by Mr. E. E. Wendt, and resolved unanimously—

That Lord Brougham be requested to act as chairman, and

Mr. G. W. Hastings and Mr. Westlake as honorary secretaries to the committee.

Mr. Wendt made the following financial statement of the Savigny Fund :—

£2,849 5s. have been subscribed and paid in to the present time ; £2,445 were invested on 12th February, 1863, in Pomeranian Provincial Bonds, bearing 4 per cent. interest.

The three academies have consented to act under the statutes.

The executors of Savigny have assigned to the institute the whole copyright in Savigny's works.

The subscriptions have been received from almost every country of Europe ; the King of Portugal has given £40.

It was moved by Mr. Westlake, seconded by Sir Erskine Perry, and resolved unanimously—

That in order to secure the practical and efficient working of this committee, it is resolved as follows :—

1. That the gentlemen who have kindly undertaken to act as honorary secretaries to this committee, viz., G. W. Hastings, Esq., and John Westlake, Esq., are hereby authorized to issue an appeal to the public through the daily press and such periodicals as they may think fit, stating this day's proceedings, and inviting all those who take an interest in the works of the illustrious Savigny to testify the same by liberal contributions.

2. That E. E. Wendt, Esq., is hereby authorized to act as treasurer to this committee, to cause the amounts received in favour of this institute to be paid in at the bank of Sir Charles Price, Bart., Maryat and Price, to the credit of an account to be opened there under the title, Committee of Savigny Institute ;

3. That the cheques to be drawn against any balance of this account must bear the signatures of the treasurer and two members of this committee ;

4. That the subscriptions received—less the expenses of this committee, to be defrayed out of the same—are to be held at the disposal of the council of the Savigny Institute in Berlin, and are to be applied in conformity with their statutes as sanctioned by H. M. the King of Prussia.

5. That this committee hereby delegates the authority for auditing the account of the treasurer to their following members, viz., Sir Fitzroy Kelly, M.P., Sir Erskine Perry, and Sir Robert Phillimore.

The Law Amendment Society has held its twentieth anniversary, and from the report presented on the occasion we make the following extracts :—

*“ Law-Reporting. —* The important subject of our law reports has, during the present session, again engaged the attention of this Society. The subject of law-reporting was originally brought before the Society by Mr. Alexander Pulling, fourteen years ago. The many evils and inconsistencies of the existing practice of recording and making public those decisions of our courts which serve as precedents in the administration of the law, are pointed out

in two able reports of committees of this Society in 1849 and 1853; and in these papers are contained some valuable suggestions for an amended system of promulgating the law expounded in Westminster Hall. At a meeting of the Society held on the 2nd March last, Mr. C. F. Trower moved the following resolutions:—

“1. That it is highly expedient that the reported decisions of our superior courts of law in England and Ireland, from the earliest to the present time, should be forthwith expurgated and consolidated, and their undue accumulation for the future be, if possible, prevented.

“2. That to this end a Royal Commission should issue to inquire and report what are the best means of effecting such expurgation and consolidation, and of preventing such an accumulation, and generally, of improving the present system of law-reporting.

“3. That a deputation of this Society do forthwith wait on the Lord Chancellor, the Chancellor of the Exchequer, and the Home Secretary, to lay the views of this Society before them, and urge upon them the immediate adoption of these resolutions.

“The meeting, approving of the principle of the resolutions moved by Mr. Trower, referred the same to a committee to report to the next meeting, as to the best mode of proceeding thereon. The committee so appointed recommended that a deputation should wait on the Lord Chancellor in reference thereto; and this recommendation having been sanctioned at the next meeting of the Society, a deputation was duly formed, and had the honour of two interviews with the Lord Chancellor on the subject. They explained to his lordship the views adopted by the Society, and asked the aid of his lordship in carrying them out. An able pamphlet, subsequently published by Mr. Daniel, Q.C., contains some practical suggestions for an amendment of our law-reporting system. The masterly exposition of the whole subject by the Lord Chancellor in the House of Lords, on the 12th June inst., in connexion with his lordship's plan for a consolidation of the law, is yet fresh in the public mind. The proposal for an immediate official inquiry into the subject of our law reports, gives to the Society sanguine hopes that at no very distant period our present practice of law-reporting may give way to a system under which the law laid down by judicial decisions may be communicated to the public in a form equally authentic with that prescribed by the legislature.”

“*Suitors' Conciliation Bill.*—Lord Brougham, in the memorable speech of 1828, on Law Reform, animadverted upon the great expense to which litigants were subjected, and recommended the adoption of Courts of Reconcilement for the cheap settlement of disputes. Since that time his lordship has repeatedly invited the attention of Parliament to the subject, and the Bill of the present session is the last of a series of efforts to carry a measure upon which this Society has long ago pronounced a favourable opinion. While the more difficult questions of law and fact will always find their way to the higher tribunals, notwithstanding the unavoidable expense attending such proceedings, there remains a large class of

cases where law and fact are simple, and where both might be disposed of satisfactorily without the expensive aid of an elaborate judicial inquiry. The third section contains the pith of the Bill. It enacts that it shall be lawful for the judge of any County Court to sit in chambers at any place within the district of the court, for the purpose of deciding any disputes, or arranging any difference that may have arisen between persons willing to refer their disputes to his amicable decision ; and on hearing such persons and other witnesses, if any, summarily and finally to decide the matter of dispute, or refrain from adjudicating on the same, as to him might seem fit."

On Saturday, the 4th of July, the annual dinner of the Society took place at Greenwich, with more than usual success. Lord Brougham, in proposing as a toast, "the Amendment of the Law," said, he was old enough to remember the time when, if a person spoke of amending the law he would be called a destructive. Though there were many good things in our law, there were also many defects. It was gratifying to him to have lived to see so many solid practical improvements in the law itself, as well as in the administration of it. He was sorry to say that the session now approaching its close was almost a blank as far as regarded any measures of legal improvement. Within the last twelve months, however, the initiative had been taken of a substantial reform ; he alluded to the great project of courts of reconciliation or conciliation, which he thought had now a fair chance of being ultimately realized. In his opinion it would be wise to make such a measure voluntary in the first instance, believing that when its advantages were felt it would in effect become compulsory. Another proposed improvement was the extension of the law which allowed the evidence of the principals in civil cases to criminal proceedings as well. He would not, however, advocate a compulsory examination, as in France, where a system of mental torture was sometimes resorted to in order to compel the accused either to confess or forswear himself ; but he would desire to see our criminal law so amended that in the event of the defendant voluntarily presenting himself for examination in public court, his evidence should be received. This amendment of our criminal law had been strongly advocated by Jeremy Bentham, Sir Samuel Romilly, and Lord Chief Justice Denman. He congratulated the Society upon the extension of their principles into France, Belgium, and Holland, and also on the success which had attended the literary department connected with the amendment of the law during the last twelve months, referring in terms of commendation to a work on the Discipline of the Bar, by Mr. Lefevre ; also to another work by Mr. Phillips, upon Jurisprudence. But of all those works, the most agreeable and valuable was Mrs. Austin's progress in the completion of the invaluable work of Mr. John Austin. The noble Lord next called attention to the valuable measure amending the law relating to the transfer of land which had been devised and carried into law in the colony of South Australia, and had subsequently been adopted in the other



Australian colonies, which measure afforded the solution of the great difficulties which the Legislature of this country had so long been struggling to overcome in amending this important branch of the law. He regarded it as the greatest practical reform of the day and congratulated the Society on having the author of that system, Mr. Torrens, amongst its members present on that occasion. There had been a report sent in by the Commission on the Execution of the Criminal Law, and from all he had heard he was very much grieved to say that he did not think it would in all respects prove satisfactory. The noble Lord concluded by giving "The Amendment of the Law."

After several other toasts had been given and responded to, the noble Chairman, in proposing the concluding toast, "Colonial Justice," bore testimony to the wisdom and sound legal knowledge of the colonial judges generally, as exhibited in their decisions which had come under his cognisance as a member of the Judicial Committee of the House of Lords, and coupled with the toast the name of Mr. Torrens, to whose labours, as he had before remarked, jurists, both in the mother country and the colonies, were so much indebted.

Mr. Torrens, after acknowledging the compliment paid to himself, returned thanks on behalf of the colonial judges, who, he believed as a body, well deserved the eulogies that had been bestowed upon them by the high authority of the venerable president. There were several legal questions of great interest, involving affairs of the mother country conjointly with those of the colonies, which he hoped would become the subject of discussion during the next session of the Society. He referred to the want of reciprocity in the bankruptcy and insolvency laws as inflicting much injustice on colonial creditors. With reference to the remarks of the president upon the report of the "Penal Servitude Commission," he gathered from the article which appeared in the *Times* that morning, that transportation was to be resumed, and that Western Australia was recommended as a receptacle capable of absorbing all the convicts from this country. At that hour he would not go into the merits of this question as to deterring punishment, but, as representing the Australian colonies on that question, he must raise his voice in protest against this conclusion. It had been asked, what right had they to interfere while Western Australia was willing to receive convicts? He replied, the same right which an Englishman would have were his neighbour to post a notice on the land adjoining his dwelling—"Filth and night soil may be shot here." There was a moral atmosphere as well as a political atmosphere; and you had no more right to pollute the one than to pollute the other. A shipment of some forty conditionally pardoned felons had recently been made from Swan River to Sydney, and one of them taken in charge for drunkenness, was found to have concealed a complete set of pick-lock tools. Their properties and lives would be imperilled, their police and judicial expenses largely increased, by the proposed resumption of transportation, and therefore they had a right to pro-

test. They had passed an Act in South Australia making it penal in the captain of a ship to land in the colony any conditionally pardoned criminal, and rendering such criminal liable to be imprisoned and shipped back whence he came by the first opportunity. This Act might be declared *ultra vires*, as repugnant to British law ; but the colonists were determined to uphold it, and the position was calculated to induce collision between the Legislature and the Bench, than which nothing could be more disastrous. Her Majesty had no more loyal subjects than the Australian colonists ; even the colonial born, when they speak of visiting England, say, " We are going home." They had shown their loyalty by pouring out their wealth to relieve distress and famine in the mother country, and in contributing largely to every national testimonial, whether to commemorate those who fell in defence of the empire, or the memory of a revered Prince, and this was an evil requital, and would be received in Australia as the grossest insult. He begged to be excused if, as a colonist, he spoke warmly on the subject ; but he yet hoped her Majesty's Ministers would consider well before they took a step which would alienate the affections of a million and a quarter of her Majesty's loyal subjects in Australia.

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### APPOINTMENTS.

Mr. R. Vaughan Williams, of Lincoln's Inn, has been appointed Judge of the County Court, district of Flintshire (Circuit No. 29), in the room of the late Mr. E. L. Richards, deceased.

Mr. Edward James, Q.C., has been appointed Attorney-General for the County Palatine of Lancaster, in the room of Mr. Bliss, Q.C., resigned.

Mr. C. H. Keene, of the Equity Bar, has been appointed a Registrar of the Court of Bankruptcy, in the room of Mr. Vizard, resigned.

Mr. George Loch, of the Middle Temple, has been appointed one of Her Majesty's Counsel.

Mr. James Sharp, jun. (of the firm of Sharp, Harrison, and Sharp, Southampton), has been appointed Treasurer of the County Courts of Hants and Sussex.

IRELAND.—Mr. W. O'Connor Morris has been appointed Assistant Crown Prosecutor for the King's County ; and Mr. G. W. Abraham Assistant Crown Prosecutor for Meath.

AFRICA.—Mr. T. L. Ingram has been appointed Her Majesty's Advocate and Police Magistrate at the Gambia.

Mr. J. C. Choppin, of the St. Vincent Bar, has been appointed Attorney-General for the island of St. Vincent.

Mr. Horatio James Huggins has been appointed Queen's Advocate for the colony of Sierra Leone.



**CANADA.**—Mr. John Sandford Macdonald has been appointed Attorney General, and Mr. Lewis Wallbridge, Solicitor-General, for Upper Canada ; and Mr. A. A. Dixon, Attorney-General for Lower Canada.

**FALKLAND ISLANDS.**—Mr. E. R. Griffiths, of the Common Law Bar, has been appointed Stipendiary Magistrate for the Falkland Islands.

**INDIA.**—Mr. F. D. Faithfull, of the firm of Faithfull and Keir, Solicitors, High Court, Bombay, has been appointed Judge of the new Small Cause Court, at Bilgaum. Mr. A. Hope, Civil and Sessions Judge of Hooghley. Mr. E. Jackson, Judge of the High Court of Judicature at Fort William, in Bengal. Mr. R. B. Swinton, Civil and Sessions Judge of Negapatam, Madras Presidency. Mr. A. St. J. Richardson, Judge and Sessions Judge of Ahmednuggur. Mr. R. F. Mactier, Judge and Sessions Judge of Satara. Mr. C. Forbes, Judge and Session Judge of Khandeish. Mr. Walter, Senior Assistant Judge and Session Judge of the Concan, for the detached station of Rutnagherry. The Hon. G. A. Hobart, Judge and Session Judge of Sholapore. Mr. C. Gonne, Judge and Session Judge of Tanna.

Mr. W. T. Tucker, Additional Judge at Tirhoot, Sarun, and Shahabad. Mr. R. B. Chapman, Magistrate and Collector at Pubna. Mr. R. Hankey, Joint Magistrate and Deputy Collector of Moorshe-dabad. Mr. J. W. Dalrymple, Civil and Sessions Judge at Bhaugulpore. The Hon. H. B. Devereux, Civil and Sessions Judge of Purneah. Mr. F. G. Millett, Magistrate and Collector of Tipperah. Mr. J. S. Armstrong, Joint Magistrate and Deputy Collector of Tipperah. Mr. F. M. Lind, Commissioner of the Allahabad Division. Mr. M. B. Thornhill, Civil and Sessions Judge of Furruckabad. Mr. H. B. Henderson, Judge of Jounpore. Mr. A. Monckton, Magistrate and Collector at Cawnpore. Mr. M. J. Walhouse, Civil and Sessions Judge of Mangalore, on the retirement of Mr. Chatfield. Mr. W. Stokes, Administrator General of Madras. Mr. J. Graham, Standing Counsel to the Government of India, to officiate as Advocate General at Bengal. Mr. W. C. Plowden, Joint Magistrate and Deputy Collector of the first grade at Ghazepore. Mr. J. Chesson, Subordinate Magistrate of the second class in the district of Sattara. Mr. T. H. Thornton, First Class Judge at Lahore, Captain C. A. MacMahon, First Class Judge at Umritsur. Mr. L. Berkeley, Second Class Judge at Delhi. Mr. J. C. Murphy, Second Class Judge at Simla. Mr. J. H. Penn, Third Class Judge at Jullundhur. Mr. G. C. Westropp, Third Class Judge at Hoshyarpore. Mr. F. R. Scarlett, Third Class Judge at Peshawur. Major F. L. Mayniac, Judge of the Small Cause Court at Nagpore. Hon. R. S. Ellis, C.B., Collector and Magistrate of the Madras District. Mr. G. Banbury, Sub-Collector and Joint Magistrate of the Madras District. Mr. H. M. S. Græme, Sub-Collector and Joint Magistrate of South Arcot. Mr. R. W. Barlow, Sub-Collector and Joint Magistrate of North Arcot.

Mr. Roberts, C.B., Judicial Commissioner of the Punjab, has been appointed to act as Judge of the Bengal High Court, in the place of Mr. Loch, who is absent on leave.

Mr. Holloway, of the Madras Civil Service, has been appointed a Puisne Judge of the High Court at Madras.

Mr. A. B. Warden, of the Bombay Civil Service, has been appointed Judge of the High Court, in the room of the Hon. H. Herbert.

Mr. H. S. Maine, LL.D., Member of the Legal Council of India, has been appointed Vice-Chancellor of the Calcutta University.

Mr. R. Westropp, of the Bombay Bar, Member of the Legislative Council of Bombay.

ST. HELENA.—Mr. William R. Phelps has been appointed Chief Justice of the Supreme Court of the Island.

## CALLS TO THE BAR.

### *Easter Term.*

INNER TEMPLE.—William Bennett Player Brigstocke, Esq.; Thomas Benyon Ferguson, Esq.; William Henry Milligan, Esq.; John Alfred Hudson, Esq.; James Edouard Ferdinand Poulin, Esq.; Francis Ashton Drake, Esq.; Samuel Sanders, Esq.; Percy Arden, Esq.; Charles Skidmore, Esq.; Arthur Richard Jelf, Esq.; Henry Offley Bright, Esq.; John Martyr Ward, Esq.; Charles James Jenkins Hannay, Esq.; Matthew Henry Starling, Esq.; and Ernest Algernon Sparks, Esq.

MIDDLE TEMPLE.—Henry Cecil Raikes, Esq.; Henry Thomas Wrenfordsley, Esq.; Charles Lovell Lovell, Esq.; and Richard Banner Oakeley, Esq.

LINCOLN'S INN.—George Edmund Wicksted, Esq.; Richard Dickson Preston, Esq.; Edward St. Aubyn, jun., Esq.; Stephen Blount, Esq.; Albert Glenie Perring, Esq.; Thomas Pitts Langmead, Esq.; and Stephen Ellis Rogers, Esq.

GRAY'S INN.—Nugent Charles Walsh, Esq.

### *Trinity Term.*

INNER TEMPLE.—Frederick Albert Bosanquet, Esq. (Certificate of Honour, First Class); William de Burgh, Esq.; Algernon Thos. Lempriere, Esq.; Henry Crompton, Esq.; Jacobus Petrus de Wet, Esq.; Arthur Moseley Channell, Esq.; Edwin Brooke Cely Trevilian, Esq.; William Henry Alexander, Esq.; Charles Bathurst, Esq.; the Honourable Douglas Edward Holroyd; Francis Thomas Egerton Prothero, Esq.; Duncan Darroch, Esq.; George Macfarlan, Esq.; Drummond Smith, Esq.; Charles Garth Colleton Rennie, Esq.; Charles Forbes Hodson Shaw, Esq.; Henry Worms, Esq.; Gwilym Williams, Esq.; John Thomas Crossley, Esq.; Robert Augustus Bayford, Esq.; John Cameron Ross, Esq.; George Godfrey Farrant, Esq.; and William Laurence Mackenzie, Esq.

MIDDLE TEMPLE.—James Lynam Molloy, Esq.; William Conrad

Reeves, Esq. ; William Primrose Mills, Esq. ; Lionel Browne, Esq. ; Leonard Harper, Esq. ; Henry Edmund Cartwright, Esq. ; William Frederick Haynes Smith, Esq. ; Francis Peter Labilliere, Esq. ; Charles Frederick Collier, Esq. ; and William Newton, Esq.

LINCOLN'S INN.—Charles Frederick Bockett, Esq. (Certificate of Honour, First Class) ; Robert Tennent, Esq. ; the Hon. Evelyn Melbourne Ashley ; Walter Molesworth St. Aubyn, Esq. ; John Gregory Watkins, jun., Esq. ; Robert Jasper More, Esq. ; Herbert George Henry Norman, Esq. ; Thomas Willert Beale, Esq. ; Charles John Hampden, Esq. ; George Miller, Esq. ; John Eden Duncombe Shafto, Esq. ; Dudley Zamoiski Beaumont, Esq. ; William Thirlwall Bayne, Esq. ; Mackertich Stephen, Esq. ; Peter Stevenson Davis, Esq. ; William Baillie Skene, Esq. ; Henry Jenkyns, Esq. ; George Alfred Paley, Esq. ; Joseph Knight, jun., Esq. ; Montague William Lowry Corry, Esq. ; Swinton Henry Boulton, Esq. ; and Alfred Lorenz Driberg, Esq.

GRAY'S INN.—William Bush Cooper, Esq. ; Arthur Pigou, Esq. ; and Robert Carr Woods, Esq.

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### BAR EXAMINATIONS.

At the public examination of students of the Inns of Court, held at Lincoln's Inn Hall, on the 19th, 20th, and 21st June last, the Council of Legal Education awarded to Mr. John Munro, student of the Inner Temple, a studentship of fifty guineas per annum, for a period of three years ; to Mr. Frederick Albert Bosanquet, student of the Inner Temple, and Mr. William Charles Druce, student of Lincoln's Inn, certificates of honour of the first class ; to Mr. William De Burgh, Mr. John Kennaway, Mr. Duncan Darroch, Mr. R. A. Bayford, Mr. Henry Stewart Reid, Mr. Maurice Powell, Mr. Henry Crompton, Mr. George Macfarlane, Mr. F. E. Prothero, and Mr. Henry S. Syres, students of the Inner Temple ; Mr. W. B. Skene, Mr. W. H. Weldon, Mr. Walter B. Renshaw, Mr. M. W. L. Corry, and Mr. J. Gregory Watkins, students of Lincoln's Inn ; and Mr. W. F. Phillpotts and Mr. James Molloy, students of the Middle Temple, certificates that they have satisfactorily passed a public examination.

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### EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

#### *Easter and Trinity Terms.*

At the final examination of candidates for admission on the roll of attorneys and solicitors of the superior courts, the examiners recom-

mended the following gentlemen, under the age of 26, as being entitled to honorary distinction :—

James Topham Ogle, aged 22 ; Thomas Dallow, aged 21 ; John Hardy Coulson, aged 24 ; Robert Nicholson, aged 21 ; and W. Webb, aged 21.

The Council of the Incorporated Law Society have accordingly awarded :—

To Mr. Ogle and Mr. Webb, each the prize of books presented by the Honourable Society of Clement's Inn ; to Mr. Dallow, Mr. Coulson, and Mr. Nicholson, each one of the prizes of the Incorporated Law Society.

The Council have also awarded to each of the under-mentioned gentlemen a prize of books given by the Incorporated Law Society :—

Charles Edward Brotherton, aged 23 ; T. W. H. Hallam, aged 25 ; J. W. Pye-Smith, aged 22 ; and Joseph E. Turner, aged 21.

The examiners have also certified that the following candidates passed examinations which entitle them to commendation :—

Alfred Caddick, aged 21 ; Arthur Footner, aged 21 ; Alfred Crick Freeman, aged 23 ; W. J. Hutton, aged 22 ; Samuel H. Lewin, aged 24 ; C. Amos Lester, aged 21 ; Hervey E. Murly, aged 22 ; George James Nutt, aged 22 ; John Slade, aged 21 ; Edward Oxford Smith, aged 21 ; Harry Snow, aged 23 ; Henry Johnson Carr, aged 22 ; William Cooper, aged 23 ; George Sangster Green, aged 21 ; John Charles Harding, aged 23 ; John Edward Gray Hill, aged 23 ; William Ramwell, aged 22 ; John Hamilton Townend, aged 22.

The Council accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examinations were highly satisfactory, and would have entitled them to prizes or certificates of merit if they had been under the age of 26 :—

John Robinson Adams, aged 31 ; George Arthur Rooks, aged 28 ; Charles Sheppard, aged 29 ; Horace William Smith, aged 31 ; Frederick Stroud, aged 27 ; William Bowles Barrett, aged 30 ; William Wallis, aged 27.

The number of candidates examined in these terms were 235 ; of these 202 passed, and 33 were postponed.

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## Necrology.

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### *April.*

24th. CLARKE, L. T. L., Esq., Barrister.

27th. MAITLAND, J. GORHAM, Esq., Barrister.

### *May.*

1st. LEWELLIN, HENRY, Esq., Solicitor, aged 44.

4th. MEADOWS, DOUGLAS SPENCER, Esq., Barrister, aged 30.

10th. HATTEN, HENRY, Esq., Solicitor, aged 68.

11th. BUDD, FREDERICK, Esq., Solicitor.

14th. EDGELL, HARRY, Esq., Barrister, aged 69.

15th. FARNELL HENRY, Esq., aged 67.

20th. HODDING, MATTHIAS THOMAS, Esq., Solicitor.

25th. BAYLEY, WILLIAM KENNEDY, Esq., Barrister, aged 59.

### *June.*

4th. GRANT, JAMES, Esq., Barrister.

8th. GLOYN, N. JOHN, Esq., Solicitor, aged 65.

25th. RICHARDS, EDWARD LEWIS, Esq., County Court Judge,  
aged 59.

### *July.*

4th. RALFE, JAMES, Esq., Solicitor, aged 86.

6th. COZENS, FREDERICK, Esq., Barrister.

14th. WILLIAMS, F. SIMS Esq., Barrister, aged 51.

16th. TUCKER, W. H., Esq., Solicitor, aged 28.

18th. TICKELL, EDWARD, Esq., Q.C., Chairman of County Meath.

21st. GEDGE, PETER, Esq., Solicitor, aged 25.

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## List of New Publications.

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*Austin*—Lectures on Jurisprudence; being the Sequel to "The Province of Jurisprudence Determined;" to which are added Rules and Fragments now first published from the original MSS. By J. Austin. Vols. II. and III.; 8vo., 24s. cloth.

*Ayrton*—A Treatise on the Transfer of Land Act, and the Declaration of Title Act; with the Registry Orders, Official Memorandum and Forms, and a full Index. By E. N. Ayrton, Esq., Barrister. 12mo., 14s. cloth.

*Bretherton*—A Manual of the Laws affecting the Qualifications, &c., of Parliamentary Voters. By E. Bretherton, Esq., Barrister. Post 8vo., 16s. cloth.

*Castle*—Practical Remarks upon the Union Assessment Committee Act, 1862. By H. J. Castle, Surveyor. 8vo., 5s. cloth.

*Cox*—The Institutions of the English Government. By H. Cox, Esq., Barrister. 8vo., 24s. cloth.

*Cripps*—A Practical Treatise on the Law relating to the Church and Clergy. By H. W. Cripps, Esq., Barrister. Fourth Edition. 8vo., 30s. cloth.

*Dixon*—A Digest of Cases connected with the Law of the Farm; including the Agricultural Customs of England and Wales. By H. H. Dixon, Esq., Barrister. Second Edition, with an Appendix of Cases up to the end of Hilary Term, 1863. Post 8vo., 21s. cloth.

*Fischel*—The English Constitution; translated from the Second German Edition. By R. J. Shee, Esq., Barrister. 8vo., 14s. cloth.

*Hodges*—A Treatise on the Law of Railways and Railway Companies. Third Edition. By C. M. Smith, Esq., Barrister. 8vo., 31s. 6d. cloth.

*Oke*—London Police and Magistracy. A Practical Summary of the Magisterial Powers of the Metropolitan Police Commissioners, and the Police, County, and City Magistrates, within their several Jurisdictions. By G. C. Oke. 12mo., 1s. sewed.

*Penfold*—The Union Assessment Committee Act, 1862: with Notes upon the Clauses; together with the Act to regulate Parochial Assessments, 1836, and the Circular Letter of the Poor Law Commissioners upon the New Act. By C. Penfold. 12mo., 2s. cloth.

*Petersdorff*—A Concise, Practical Abridgment of the Common and Statute Law. By Mr. Serjt. Petersdorff, assisted by C. W. Wood

and W. Marshall, Esqs., Barristers. Second Edition. Vol. V., royal 8vo., 30s. cloth.

*Phillips*—Jurisprudence. By C. S. M. Phillips, Esq., Barrister. 8vo., 12s. cloth.

*Stephen*—A General View of the Criminal Law of England. By J. F. Stephen, Esq., Barrister. 8vo., 18s., cloth.

*Stopford*—A Handbook of Ecclesiastical Law and Duty, for the Use of the Irish Clergy. By E. A. Stopford. Post 8vo., 7s. 6d. cloth.

*Tennant*—The Notary's Manual, for the Cape of Good Hope. By H. Tennant. Third Edition. 8vo., 24s. cloth.

*Tudor*—A Selection of Leading Cases on Real Property, Conveyancing, and the Construction of Wills and Deeds: with Notes. By O. D. Tudor, Esq., Barrister. Second Edition. In one thick volume, royal 8vo., 42s. cloth.

*Warren*—A Popular and Practical Introduction to Law Studies, and to every Department of the Legal Profession. By S. Warren, Esq., Q.C. Third Edition. Two volumes, 8vo., £2 12s. 6d. cloth.

*Wilson*—Registration of Title to Land. By R. Wilson. 8vo., 12s. cloth.





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